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Uli Widmaier

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I. INTRODUCTION

Should the First Amendment be rethought? Are the values of free speech endangered by maintaining the traditional interpretation of the First Amendment? Is it appropriate to allow the modern mass media to function as a private market system? Are we blinded by the power of the libertarian tradition to the shortcomings of press and broadcast? Has the time come to drop what once was an empirical assumption but has long since rigidified into dogma, namely, that freedom from state interference best serves the ideals behind the First Amendment?

Today, the "Worthy Tradition" celebrated by Harry Kalven seems to reign triumphant in the courts.[1] What controversies remain in a free speech regime under which the defenses against state interference are so strong that the permissibility of burning the American flag is, in Professor Akhil Amar's words, as "easy a case in modern constitutional law as any I know"?[2] The theoretical debates, the ideological and philosophical struggles surrounding the First Amendment, may seem increasingly irrelevant in the face of the Supreme Court's commitment to a First Amendment jurisprudence of virtually insurmountable defensive capabilities against the state. The Supreme Court recently reiterated the core principles of that jurisprudence:

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* B.A., M.A., Brown University (1990); J.D., Yale Law School (1994). Associate, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd.

[1] *See* HARRY KALVEN, JR., A WORTHY TRADITION—FREEDOM OF SPEECH IN AMERICA (1988). Kalven's "Worthy Tradition" is the evolution of First Amendment law during the twentieth century into a powerful "shield around the speaker." Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986) [hereinafter Fiss, *Free Speech*] (discussing Kalven's analysis). Fiss has aptly called this evolution, as described by Kalven, "an example of the law working itself pure." OWEN M. FISS, THE IRONY OF FREE SPEECH 6 (1996) [hereinafter FISS, IRONY].

[2] Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 125 (1992) (describing Texas v. Johnson, 491 U.S. 397 (1989)).

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[3]

America has achieved a free speech paradise. Or has it?

Some scholars feel that the realization of this laissez-faire perfection does not serve the values underlying the First Amendment.[4] They argue that the Supreme Court's free speech orthodoxy has neglected the social costs of condemning the state to virtually total inaction. Preventing the state from taking positive action in the free speech arena eliminates the one force in society that could efficiently foster crucial speech values that are unachievable in any immediate way by private action, especially private action motivated by monetary gain.[5]

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[3] Reno v. American Civil Liberties Union (ACLU), 117 S. Ct. 2329, 2351 (1997) (holding that provisions of the Communications Decency Act of 1996, broadly prohibiting indecent and patently offensive materials on the Internet, violate the First Amendment).

[4] *See* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 954 (1995), for a summary of some arguments of "the new speech regulators," among whom she includes Cass R. Sunstein, Catharine A. MacKinnon, Mari J. Matsuda, Owen M. Fiss, J.M. Balkin, Charles R. Lawrence, III, and Frederick Schauer.

[5] "[T]o join in the attack on the activist state that is so fashionable today would expose us to an even greater danger: politics dominated by the market. We are left without a remedy." Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 792 (1987) [hereinafter Fiss, *Why the State?*]. In that article, Fiss defends a First Amendment that embraces an activist state against "decentralization" attacks from both the political left and the right. *See id.* at 790–94. However, the dissatisfaction with a purely defensive understanding of the First Amendment is most often seen as a reaction to the alleged appropriation of traditional First Amendment doctrine by the political right. *See, e.g.*, Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375. Schauer explains some of the political considerations underlying this dissatisfaction:

> As recent attacks on the public-private distinction in the context of freedom of speech have reminded us, the non-involvement of government does not leave an open and unregulated marketplace, but rather a marketplace regulated by all of the economic, social, cultural, and psychological forces that operate even when the state does not. And as long as we can imagine that there are winners and losers in economic, social, cultural, and psychological wars, then it should come as no surprise that those who would expect to win in these wars would be quite comfortable with keeping government out, while those who would expect to lose in these wars might expect that intervention would do them more good than harm.

Schauer, *supra* at 950 (citations omitted).

Thus, a dichotomy has opened up. On the one hand, there are the positive core values underlying the right to free speech, such as robust public debate about issues of political importance—the very lifeblood of this democracy and the bedrock of the First Amendment as traditionally conceived.[6] On the other hand, there is today's First Amendment—certainly awesome as the pinnacle of the noble evolutionary history that Kalven has traced, but now perhaps becoming anemic, not really standing *for* anything, sapped of affirmative value and visceral appeal by the anti-government dogmatism that is its central teaching. There are so many things in the speech arena that we want to improve or change but that the state is incapable of addressing due to the pervasive prohibitions against state action imposed by the current First Amendment—for example, the quality of television (especially children's television), the manner in which individuals and corporations contribute to political parties and campaign funds, the embarrassingly low level of political debate, the frightening ease with which minors can gain access to inappropriate materials on the Internet, and the insidious effects of pornography and hate speech—that the price of living with these prohibitions may simply have become too high.[7]

Recently, two preeminent legal scholars, Professors Owen M. Fiss and Cass R. Sunstein, have provided reassessments of the First Amendment along these lines.[8] They have called for an abandonment of the traditional First Amendment fixation on restricting state action, advocating instead a new First Amendment which promotes the state's active pursuit of those substantive values that, in their view, are constitutive of the right to free speech itself.[9]

In a short book that is "almost magisterial in its simplicity"[10]—to use the words with which he characterizes the First Amendment—Fiss argues that the First Amendment should be "embracing of . . . regulation . . . [that] seeks to further the democratic values that underlie the First Amendment itself."[11] Fiss regards the traditional First Amendment jurisprudence as today little more than an anachronistic shell emptied of the meaning heretofore held, and, most importantly, as an impedi-

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[6] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26–28 (1979) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM].

[7] *See* Sullivan, *supra* note 4, at 954.

[8] *See* FISS, IRONY, *supra* note 1; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (2d ed. 1995) [hereinafter SUNSTEIN, DEMOCRACY].

[9] *See* FISS, IRONY, *supra* note 1; SUNSTEIN, DEMOCRACY, *supra* note 8.

[10] FISS, IRONY, *supra* note 1, at 5.

[11] *Id.* at 19.

ment to the continuing development of democracy.[12] He calls for a remaking of free speech law, away from the exclusive fixation on keeping the state out of the free speech arena and toward embracing the state as the friend of free speech values.[13] Similarly, in his book, *Democracy and the Problem of Free Speech*, Sunstein calls for a rethinking of the First Amendment along the lines of "Madisonian" democratic values.[14]

The "New Deal for speech" that Sunstein advocates[15] is closely related to the Fissian First Amendment revolution. Both Sunstein and Fiss conceive of the right to free speech as allowing, even demanding, broad state regulation in furtherance of the values underlying the right to free speech.[16] Both are prepared to give up the centerpiece of the American free speech culture, namely, categorical restriction of the state when it comes to speech matters. Instead, Sunstein and Fiss would encourage the state to regulate speech in order to help society achieve robust and diverse public debate on issues of societal importance and hence boost what they consider to be the central value underlying the First Amendment: collective democratic self-determination.[17] Their arguments are reflected in the recent First Amendment jurisprudence of U.S. Supreme Court Justice Stephen Breyer. Justice Breyer's concurrence in the Supreme Court's second *Turner Broadcasting* decision, while not directly citing to their writings, is an important judicial endorsement of Sunstein's and Fiss's ideas.[18]

The revolutionary doctrinal visions put forth by Fiss and Sunstein have been realized. Not in the United States, to be sure, but in a European country. German constitutional law has for decades adhered

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[12] This assumption underlies and motivates Fiss's entire argument. It is specifically set forth in Chapter 1 of FISS, IRONY, *supra* note 1, at 5–26.

[13] *See, e.g., id.* at 19, 83.

[14] SUNSTEIN, DEMOCRACY, *supra* note 8, at xix, 17–51 (explaining his proposed "New Deal for Speech").

[15] *See id.* at 17–51.

[16] *See* FISS, IRONY, *supra* note 1; SUNSTEIN, DEMOCRACY, *supra* note 8.

[17] FISS, IRONY, *supra* note 1; SUNSTEIN, DEMOCRACY, *supra* note 8. This article focuses primarily on the theoretical premises and doctrinal consequences of developing a new First Amendment approach based on a pursuit of certain values, using the regulation of broadcast as its central example. It does not deal with the First Amendment implications of restricting pornography and hate speech. For a brilliant argument on why such restrictions, as recently demanded by some on "the American political left," are essentially intellectually incoherent, *see* Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1500 and *passim* (1996).

[18] Turner Broadcasting System, Inc. v. F.C.C., 117 S. Ct. 1174, 1203–05 (1997) [hereinafter *Turner II*].

to a free speech regime where the state must act as the guarantor of those values and interests that the constitutional provision protecting free speech is supposed to achieve. It is particularly with respect to the non-print mass media that the idea of the state as a "friend of speech"[19] has been embraced. The German Constitutional Court[20] has developed a detailed and sophisticated constitutional framework for broadcast regulation. In order to evaluate properly the claims set forth by thinkers such as Fiss and Sunstein, it is important to study the German system. The Constitutional Court's jurisprudence on the issue of speech regulation is entitled to special attention not only because it has determined and shaped the media landscape of an entire nation, but because Germany is a country with a respectably functional democracy and with a recent history that would seem to force upon any responsible German decisionmaker a heightened awareness of the dangers associated with the state's curtailing or manipulating the freedom of expression.

The free speech rules pertaining to the press and the electronic mass media in Germany and the United States are roughly analogous. In both countries the press is basically free from state interference. There is no licensing of the press, no censorship, and no state involvement in the editorial process. The press is privately owned. In both countries, constitutional doctrine is based on the assumption that this laissez-faire approach to freedom of the press is constitutive of the proper functioning of the press and indispensable to democratic self-determination. On the other hand, the non-print mass media in both countries are subject to levels of state intrusion and regulation that would be unconstitutional if applied to the printed press. The constitutional jurisprudence of both countries has generally upheld and validated a bifurcated system in which the press is largely free from government

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[19] FISS, IRONY, *supra* note 1, at 83.

[20] *See generally* KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT (1997). The Constitutional Court is the highest court in Germany. It deals, as its name suggests, exclusively with questions of constitutional law. The staffing of the Constitutional Court is unlike that of any other court in the German system. Ordinarily, being a judge in Germany is a career path chosen upon full admission to the bar. The young lawyer starts in small claims court and, by seniority and quality of performance (determined by evaluations of the judge's written opinions by superior judges), can rise to higher and higher courts. All German judges, except for those sitting on the Constitutional Court, are products of this judicial bureaucracy. The judges on the Constitutional Court, in contrast, are nominated to the Court by parliamentary committees. The process is politicized, if perhaps not as visibly so as in the United States. Any lawyer can be nominated: judges, practitioners, academics, politicians, etc. *Id.*

regulation while the broadcast media are generally subject to regulation.[21]

Aside from these broad similarities, there are important differences between the two countries' approaches to all mass media. The presumptions against government involvement are weaker in German mass media law. The German Constitutional Court has never adopted the rationale of the *New York Times v. Sullivan* decision.[22] Instead, the Constitutional Court has consistently affirmed the imposition of stringent truth and factual correctness standards on newspaper reporting, standards that Justice Brennan's opinion forcefully dismissed.[23] More importantly, though, the Constitutional Court has interpreted the constitutional guarantee of freedom of broadcast to mean something rather different from the textually adjacent freedom of the press.[24] Since 1961, the time of its first decision concerning free speech in the

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[21] For a concise summary of the differential treatment of press and broadcast in the U.S., *see* Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 637–41 (1994) [hereinafter *Turner I*]. The analogous rule in German law is set forth in, for example, 12 Entscheidungen des Bundesverfassungsgerichts (decisions of the Constitutional Court) (BVerfGE) 205, 260–63 (1961). In the United States, cable television and the Internet have been explicitly exempted from the "special justifications for regulation of the broadcast media . . . ." *Reno*, 117 S. Ct. at 2343 (holding that strict First Amendment scrutiny applies to regulation of the Internet). *See also Turner I*, 512 U.S. at 637–40 (holding that the scarcity rationale that supports regulation of traditional broadcast does not apply to cable television). In Germany, in contrast, cable television is treated the same for constitutional purposes as traditional broadcast. *See, e.g.*, 90 BVerfGE 60 (1994).

[22] *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

[23] *See id.* In *New York Times v. Sullivan*, Justice Brennan wrote:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279–80. Contrast this with the "duty of truth" jurisprudence of the German Constitutional Court. Roman Herzog summarizes the German position in the following way:

> Relating false news is covered by Article 5.1 Sentence 2 [freedom of the press] only if the mistake that led to the incorrect statement was made due to minor negligence. This level of tolerance is to be regarded as sufficient.

Roman Herzog, *Kommentar zu Artikel 5, in* KOMMENTAR ZUM GRUNDGESETZ 53 (Dr. Theodor Maunz et al. eds., 1996) (emphasis added). The author is responsible for all translations of German passages in this article.

[24] *See infra* note 32 and accompanying text, for a complete citation of Article 5, the free speech clause of the German Basic Law.

broadcast area, until the present, the Constitutional Court has never wavered in its conviction that the freedom of broadcast is a freedom not primarily for the broadcasters themselves. Rather, the Constitutional Court has viewed the freedom of broadcast as a freedom *in service of* the people, of their process of opinion formation, and thus in service of democracy.[25] The Constitutional Court has concluded that the basic values protected by the freedom of broadcast clause constitutionally necessitate legislative action.[26] While in the United States, regulation of broadcast is only permitted, but not required, under the First Amendment, the German Constitutional Court has expressly required the legislatures to pass laws that are supposed to guarantee objectivity of information, diversity of viewpoint, furtherance of democratic values, and a certain measure of "quality."[27]

Germany and the United States thus share the idea that broadcasters can be subjected to a level of state regulation incommensurate with the freedom of the traditional press.[28] The difference between the constitutional systems of the two countries is that, unlike the First Amendment as traditionally understood, the Basic Law,[29] as interpreted by the Constitutional Court, *commands* legislatures to pass detailed laws and regulations that must ensure that broadcast conforms with what amounts to catalogues of democratic values drafted by the legislatures and subject to judicial scrutiny.[30]

In this article, I examine the arguments that these supporters of speech regulation have put forth. I conclude that the arguments made by the German Constitutional Court as well as by Sunstein and Fiss are closely related and suffer from similar and severe weaknesses. These arguments do not support the claim that regulation is necessary, or preferable to a laissez-faire regime as it is found in the press area. While there are problems and risks associated with an unregulated media market populated by large and powerful participants, these risks may be largely containable and controllable by an intelligent application of

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[25] *See, e.g.*, 57 BVerfGE 295, 320 (1981).

[26] *Id.*

[27] *See Turner I*, 512 U.S. at 637–38; 57 BVerfGE at 320 (for furtherance of democratic values); 73 BVerfGE 118, 155–56 (1986) (for quality concerns).

[28] *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969). In *Red Lion*, the Supreme Court stated that "[it] is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.* The German conception of broadcasters as public trustees is set forth in 31 BVerfGE 314, 329 (1971).

[29] The Basic Law ("Grundgesetz," abbreviated "GG") is the name of the German Constitution.

[30] *See infra* Part II(B)(2).

existing First Amendment doctrine. A fundamental rethinking of the First Amendment in the direction of mandating or liberally permitting regulation, suggested by American pro-regulation scholars and epitomized by the freedom of broadcast jurisprudence of the German Constitutional Court, is unsupported by the arguments advanced in its favor, unnecessary, and might well be damaging to the very values it seeks to promote. In short, neither the theories of Fiss and Sunstein nor the jurisprudence of the German Constitutional Court have been able to develop a set of rationales that would convincingly support state action as a means to realize and guarantee the values of free speech. Moreover, they have not developed a set of structures that would promise to contain the risks of state involvement in this area. Were the U.S. Supreme Court to adopt Germany's broadcast regime as a model for a new First Amendment, it would take an unfortunate step toward destabilizing a constitutional system that has largely managed to avoid the temptation to systematize its underlying values, that has remained resilient because it has remained philosophically "messy."[31]

II. FREEDOM OF BROADCAST IN GERMANY

A. *Article 5 Within the Basic Law's Objective Hierarchy of Values*

Article 5 of the German Basic Law states:

> (1) Each person has the right freely to express and disseminate his opinion in word, writing, and picture, and to obtain information from generally accessible sources without interference. The freedom of the press and the freedom to report information through broadcast and film are guaranteed. There shall be no censorship.
> (2) These rights are limited by the provisions of the general laws, the laws for the protection of minors, and the law of personal honor.

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[31] The term is Martha Nussbaum's, who is committed to a conception of human deliberation that is "mundane, messy, and lacking in elegance" because it deliberately sacrifices (Platonic) theoretical elegance and simplicity for the sake of (Aristotelian) "practical wisdom." MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS—LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 372 (1986). Sunstein's recent post-Madisonian conceptualization of American constitutional law in terms of "incompletely theorized agreements" seems to me closely related to Nussbaum's Aristotelianism. *See infra* notes 259, 333, and 361.

> (3) Art, science, research, and teaching are free. Freedom of teaching does not absolve from fidelity to the constitution.[32]

In its 1981 opinion on the freedom of broadcast, the Constitutional Court provided a detailed explanation of its approach to Article 5.1, which contains the freedom of broadcast provision.[33] According to the Court's conception of constitutional law, particular constitutional clauses are embedded in a larger system of interrelated norms. The following passage exemplifies this approach:

> Article 5.1 Sentence 2 of the Basic Law demands legislation regulating private broadcasting.[34] Such legislation must provide the conditions necessary to guarantee the freedom of broadcast. In order to become effective, the freedom of broadcast that is constitutionally guaranteed by Article 5.1 Sentence 2 of the Basic Law must be legislatively substantiated. This necessity results from the purpose and the special character of the constitutional guarantee at issue. The freedom of broadcast serves the same purpose as all guarantees of Article 5.1 of the Basic Law: to ensure the formation of free individual and public opinion in a comprehensive way that includes every transmission of information and opinion and is not limited to the mere reporting of news or to the transmission of political opinions. . . . A free formation of opinion takes place in a process of communication. It is predicated on the one hand on the freedom to express and disseminate opinions, and on the other hand on the freedom to take notice of expressed opinions and to inform oneself. By guaranteeing as human rights the freedoms to express opinions, to disseminate opinions, i.e., to inform oneself, Article 5.1 of the Basic Law seeks at the same time to protect this process constitutionally. In this respect, Article 5.1 grants subjective rights; in connection therewith it normatively establishes the freedom of opinion as an objective principle of the entire legal order, whereby the elements of subjective and objective rights condition and support one another . . . .[35]

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[32] Art. 5 GG.

[33] 57 BVerfGE 295 (1981).

[34] The provision reads: "The freedom of the press and the freedom to report information through broadcast and film are guaranteed." Art. 5.1 sent. 2 GG.

[35] 57 BVerfGE at 319–20.

What is the nature of this constitutional system which places such a premium on the interdependence of particular constitutional provisions? How does this organic, almost holistic, approach affect concrete constitutional rights?

In the German system, all fundamental rights (contained in the first 19 Articles of the Basic Law) are viewed as connected with and dependent upon each other.[36] They are not equal, but rather hierarchically organized, with Article 1 at the pinnacle.[37]

The Constitutional Court firmly established this systematic and hierarchical nature of the Basic Law early in its history. In the *Lüth* opinion,[38] the Court faced the constitutional complaint of Mr. Erich Lüth, a prominent member of the press who had called for a boycott of a new movie directed by Veit Harlan, the director of the infamous Nazi propaganda film "Jud Süss."[39] Harlan had been successful in obtaining an injunction against Lüth in state court that prevented Lüth from repeating his call for a boycott.[40] The Constitutional Court overturned the injunction, holding that Lüth's Article 5 interest outweighed Harlan's economic interest in not being boycotted.[41] In the course of its opinion, the Court explained that all of German law is pyramidally

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[36] *See, e.g.*, 7 BVerfGE 198, 204–05 (1958).

[37] *Id.* Article 1 of the Basic Law reads as follows:

> (1) The dignity of the human being is inviolable. It is the duty of all state power to respect and protect it.
> (2) The German People therefore acknowledge and accept the existence of inviolable and inalienable human rights that are the foundation of every human society, of peace, and of justice in the world.
> (3) The following basic rights bind the legislature, the executive, and the judiciary as immediately effective law.

Art. 1 GG. A prominent treatise on the Basic Law describes the motivations behind Article 1 as follows:

> Article 1 is a direct reaction to crimes against humanity committed by the National Socialists. Its position as the most prominent and the foundational statement of the Basic Law results from the desire of the drafters of the Basic Law to reverse forever the National Socialist idea that the state, or the community, is everything and the individual nothing. Accordingly, the dignity of the (individual) human being is the highest value of the Basic Law (32 BVerfGE 98, 108). Goals of the state have no value of their own; they derive their justification solely from the fact that they concretely serve human beings.

HANS D. JARASS & BODO PIEROTH, GRUNDGESETZKOMMENTAR 27–28 (1992).

[38] *See* 7 BVerfGE 198.

[39] *See id.* at 200.

[40] *See id.* at 201–02.

[41] *See id.* at 240.

arranged, with Article 1 of the Basic Law at the top, the other basic human rights immediately under it, and so on.[42] Therefore, every statute has to be interpreted so as not to infringe on constitutional rights.[43] The judge in the court below had interpreted the particular statute on which the injunction against Lüth was based in such a way as to make it infringe on Lüth's right to express his opinion, thus applying the law unconstitutionally.[44]

Lüth remains a pillar of the German constitutional order; it defines the basic structure of German constitutional jurisprudence. The Constitutional Court rejected the notion that the Basic Law is a value-neutral order.[45] Instead, the Basic Law expresses a positive commitment to an "objective hierarchy of values" predominantly contained in the basic-rights section (Articles 1–19 of the Basic Law) and fundamentally informed by Article 1's concept of human dignity:

> Without any doubt, the basic rights are primarily designed to protect the sphere of freedom of the individual from intrusions of public power; they are defensive rights of the citizen against the state. . . . It is just as true, however, that *the Basic Law does not want to be a value-neutral order. In its section on basic rights, the Basic Law has also erected an objective hierarchy of values.* Particularly therein lies a fundamental strengthen-

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[42] *See id.* at 204–05.

[43] *See* 7 BVerfGE at 208–09.

[44] *See id.* at 222–30. The Constitutional Court recently explained the relation of the right to free speech to "general laws," such as the one applied against Mr. Lüth, as follows:

> Neither the freedom of the press nor the freedom of broadcast are granted without limitations. According to Article 5.2 of the Basic Law, they are limited by the general laws, *i.e.*, all laws that are not directed specifically against the media or against a specific opinion, but that simply serve to protect another legal right irrespective of particular information or opinions, as long as that legal right is not inferior to the constitutional protection of the media . . . . This does not mean, however, that Article 5.2 of the Basic Law permits arbitrary infringements of the freedom of the media if those infringements are based on a general law. Rather, the Basic Law demands that laws which limit constitutional rights are interpreted and applied in light of the infringed constitutional right so that the value-determinative significance of the constitutional right is properly reflected at the level of applying the general law . . . . Generally preferring the legal right in whose name the constitutional right is being infringed would not be in accordance with this approach. Rather, the value of he infringed constitutional right and the value served by the infringing general law must be balanced.

91 BVerfGE 125, 135–36 (1994) (citations omitted). For an excellent explanation of these decidedly confusing issues, *see* Peter E. Quindt, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

[45] *See* 7 BVerfGE at 204–05.

> ing of the validity and force of the basic rights. . . . This system of values is centered on the human personality that freely develops within the social community, and on the dignity of that personality. The system of values must be viewed as a fundamental constitutional decision for all aspects of law; legislation, administration, and adjudication receive guidelines and impulses from this system. In this way, the Basic Law's objective hierarchy of values obviously also influences civil law; no provision of civil law may contradict the value hierarchy; each provision must be interpreted according to its spirit.[46]

Hierarchical arrangement of constitutional rights and commitment of the entire legal order to a central value, such as human dignity, have interesting and often disturbing consequences. They create a certain fluidity of the system, a reactiveness and sensitivity of fundamental constitutional rights to each other that sometimes makes even seemingly absolute guarantees surprisingly infringible. Absolutism with respect to specific constitutional rights is not a virtue practiced by the Constitutional Court; balancing of the various rights and values involved in a legal conflict is the Court's preferred methodology.

In its *Mephisto* opinion of 1971, the Constitutional Court demonstrated these shortcomings in striking fashion.[47] The Court held that freedom of art, expressly granted in Article 5.3, may have to yield to human dignity concerns despite the fact that the rights protected by Article 5.3 are formulated in an absolute fashion.[48] The Court affirmed a lower court's prohibition of the publication of Klaus Mann's novel *Mephisto.*[49] In the novel, Mann portrays the actor Gustaf Gründgens as the "abject type of the treacherous intellectual who prostitutes his talent for the sake of some tawdry fame and transitory wealth" during the Third Reich.[50] Gründgens's stepson sued the publisher of the novel, reasoning that the portrayal violated his (deceased) father's human dignity which is protected by Article 1 of the Basic Law.[51]

The Court upheld the ban of the *Mephisto* novel in Germany on the basis of that rationale.[52] Reasoning that freedom of art is not an autono-

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[46] *Id.* at 204–05 (citations omitted, emphasis added).

[47] *See* 30 BVerfGE 173 (1971).

[48] *See id.* at 193.

[49] *See id.* at 199–200.

[50] *Id.* at 175, quoting KLAUS MANN, THE TURNING POINT at 281–82 (1942).

[51] *See id.* at 176–81.

[52] *See* 30 BVerfGE at 195–96.

mous freedom but rather part of the constitutional value system and ultimately an emanation from Article 1's guarantee of human dignity, the Court stated:

> [Freedom of art] is not granted without limitations. Like all basic rights, [freedom of art] is based on the Basic Law's image of the human being, *i.e.*, based on the human being as an independent and responsible personality who freely unfolds within the social community . . . . [A] conflict that arises with respect to the freedom of art must be solved through constitutional interpretation according to the value order of the Basic Law and according to the unity of this fundamental value system. As part of the Basic Law's system of values, freedom of art is particularly associated with the dignity of the human being guaranteed in Art. 1, which as supreme value dominates the entire value system of the Basic Law . . . . Despite that [association], freedom of art can conflict with the similarly constitutionally protected [by Art. 1] personal sphere because a work of art can have consequences on a social level.[53]

Therefore, a balancing must be performed between the violation of the personal sphere of the plaintiff and the speech right of the defendant.[54] The Court held that the lower court had correctly performed this balancing act; the lower court's holding that the dignity interest of Mr. Gründgens, the deceased, outweighed the interest protected by the freedom of art had to be affirmed.[55]

Conceiving of the right to free speech as primarily an instrument for realizing certain values leads inevitably to a destabilization of the right. This approach deemphasizes an examination of how best to achieve a guaranteed freedom in the real world, and instead necessitates considerations of a much more abstract nature—weighing and balancing interests, uncovering ultimate values, systematizing those values and prioritizing among them. Consequently, a systematic analysis of basic principles becomes primary while issues concerning how best to protect and support the constitutional right, whatever its theory, recede into the background. In fact, in a value system such as the German one, questions about rights *qua* rights, that is, irrespective of

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[53] *Id.* at 193 (citations omitted).

[54] *Id.* at 195–96.

[55] *See id.* at 195–99.

their theoretical justifications or underpinnings, are quite meaningless. In the *Mephisto* case, for example, freedom of art loses because its meaning, force, and validity depend on, and in this case conflict with, its own philosophical underpinning—human dignity.[56]

The connection between legal doctrine on the one hand and the values underlying that doctrine on the other is attenuated, not immediate. Careful arguments are needed to translate theoretical insights into a practical rule. The Constitutional Court's free speech jurisprudence is an example of judicial reasoning that almost completely dispenses with an explanation of the link between constitutional theory and concrete prescriptions in the service of that theory. Consider the *Mephisto* case. From a real-world perspective, its outcome is difficult to justify. The Court outlawed a work of literature that, without any doubt, constitutes an important contribution to a political and social debate of substantial relevance to German society.[57] The *Mephisto* novel analyzes a type of political opportunist, the one who has no political commitments or who suppresses them for the sake of career and comfort of conscience.[58] By artistically working through the psychology of such a human being, Mann raised issues that urgently needed to be addressed in post-war Germany. The Court missed all that, and it did so precisely by embedding the freedom of art in the hierarchical value matrix of the Basic Law. *By doing so, it destroyed the freedom.* The freedom may have been formulated as an absolute, but it is now open to simply being balanced away by weighing its value against the value of a competing or "superior" constitutional right. This is more than an infringement at the margins of a constitutional right. This is vulnerability at the core. Responsible for that vulnerability is the shifting of the debate onto the level of value, of abstract concept, instead of keeping the debate firmly grounded in concrete facts and legal categories. Value debate allowed the *Mephisto* Court to permit an arguably minuscule interest, the reputational interest of a dead Nazi actor, to win out against major ones, such as the right of a national audience to receive works of artistic and social relevance and the right of authors and publishers to be free from state censorship, without so much as evincing a glimmer of insight that the ruling might be problematic.[59]

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[56] *See id.* at 193–95.

[57] For a discussion of the novel's political relevance, *see id.* at 200–27 (dissents by Justices Dr. Stein and Rupp-v. Brünneck).

[58] *See id.* at 212–14.

[59] *See generally id.* at 174–200 (majority opinion).

Such is the seductive power, and the rhetorical utility, of the value focus.

B. *The Roots and Development of the Freedom of Broadcast Doctrine*

1. The Television Opinion of 1961

When the Constitutional Court, in 1961, was confronted for the first time with constitutional questions concerning the structure of German broadcast,[60] specifically television, there existed only one television channel in the country.[61] This channel, called "ARD" (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland—association of the public broadcast stations of the Federal Republic of Germany), was the result of a cooperation of the nine public broadcast stations then in existence in Germany.[62] These public broadcast stations were organized under state law.[63] Some of these stations issued from one state only, while others involved the cooperation of several states on the basis of specific broadcast agreements among them.[64] In 1960, the federal government decided to organize this second channel as a limited liability company (GmbH) owned by the federal government.[65] Several states sued, citing various violations of their sovereignty and, in addition, a violation of Article 5.[66] They won on both counts.[67]

While most of the opinion discussed questions concerning the distribution of competency between the states and the federal government, there is a brief section at the end that addresses issues arising under Article 5.[68] This section proved defining for the Court's future approach to Germany's broadcast system. The Court held that public monopoly broadcasting as it existed in Germany at the time was constitutionally acceptable.[69] While, in 1998, the public monopoly over television has been broken for over a decade, making certain parts of the 1961 opinion obsolete, the Court's basic approach has never

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[60] *See* 12 BVerfGE 205.
[61] *See id.* at 212.
[62] *See id.* at 211–12.
[63] *See id.* at 211.
[64] *See id.*
[65] *See* 12 BVerfGE at 215.
[66] *See id.* at 216–18.
[67] *See id.* at 207.
[68] *See id.* at 259–64.
[69] *Id.* at 262.

changed. Legislative control over broadcast is still seen as constitutional.[70] In fact, that control has increased over time. Under the 1961 opinion, regulation of broadcast was only constitutionally permitted; from the 1970s onward, it was constitutionally demanded.[71]

The relevant part of the 1961 opinion[72] started out, ironically, by affirming the Court's commitment to a free, private and unlicensed press, as well as the equal importance of broadcast as a means of mass communication and as a contributor to the formation of public opinion.[73] The Court thus chose, at this early stage of doctrinal development, not to distinguish press and broadcast by some inherent differential of journalistic quality.[74] It could have claimed that broadcast is a medium of mere entertainment value, not to be taken seriously as a means of enriching public debate or informing the populace. Instead, the Court did the contrary. It insisted on broadcast's equal significance, and it granted broadcast the full protection of Article 5.[75]

Given the reality of single-channel public television in the Germany of the early 1960s, however, the Court was forced to accommodate doctrinally the disparate press and broadcast systems. It did so by accepting the empirical assumption that many independent, privately owned newspapers of diverse political orientations existed in Germany, and that they provided a broad spectrum of viewpoints.[76] With respect to broadcast, the situation at the time was different. Only one television channel existed for the whole nation, and only one more was likely to appear in the foreseeable future. Organization of these programs was by state or federal law; purely private broadcast stations were nonexistent.[77] The Court recognized and accommodated this reality. While the Court touched tersely on two other scarcity rationales—economic and spectrum scarcity—to justify treating broadcast differently from

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[70] *See, e.g.*, 83 BVerfGE 238, 295–98 (1991).

[71] *See id.; see also* 31 BVerfGE at 325.

[72] *See* 12 BVerfGE at 259–64.

[73] *Id.* at 260.

[74] *See id.* at 260–61.

[75] *Id.*

[76] *Id.* at 259–61.

[77] The Court recited the post-war history of broadcast in Germany in the following way:

> After World War II, German entities were prohibited from running broadcast stations. The stations were confiscated and run by the Allies, who gradually gave broadcast back into German hands. The Western Allies aimed at eliminating any state influence over broadcast. In the three Western zones of occupation, the military governments or the state governments (which were heavily influenced by the occupying powers) passed laws

the press,[78] it is palpable from the opinion that the Court's ruling is based primarily on the reality of the German television system in 1961.[79]

It is to be noted that, at this early stage of its treatment of the broadcast issue, the Court used permissive, rather than mandatory, language. Under the Basic Law, it was permissible, and permissible only, to address the problems arising out of the scarcity of broadcast providers by establishing a public broadcast monopoly, as long as certain standards of freedom from state intervention into the editorial process were guaranteed.[80] In addition, an appropriate diversity of viewpoints had to be given voice within a single television station.[81] This was a reasonable strategy since no external sources of diversity (i.e., multiple stations) were available. In the realm of the press, in contrast, diversity of viewpoints was maintained by virtue of the actual existence of many newspapers with different political and social outlooks.[82] The overall mix presumptively yields an array of opinions representative of the nation as a whole.[83]

Thus, by 1961, the Court had constitutionally recognized two opposite mass media realities, and had thereby set the stage for the development of the two constitutional paradigms of broadcast. The "internally pluralistic model" of broadcast is based on structuring an extremely limited number of television stations in such a way as to

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> creating public broadcast stations. These broadcast stations were given the right to manage themselves. Some of them were kept under strict legal supervision. The basic tenets of programming, as well as the rules concerning tasks, organization, and economic structure of these stations were aimed at securing their independence from the state and their political neutrality. The same is true for the broadcast stations which were created later, and without influence of the Allies, by laws or treaties among the states.

12 BVerfGE at 210.

[78] The Court wrote:

> . . . in the realm of broadcast the number of offerors of programs must remain relatively small because of technical reasons as well as the unusually high costs associated with broadcasting. This special situation in the realm of broadcast requires specific accommodations for the realization and maintenance of the freedom of broadcast guaranteed in Article 5 of the Basic Law.

Id. at 261.

[79] *Id.* at 261–62.

[80] *Id.* at 262 (stating that a broadcast monopoly does not conflict with Article 5 given the technical realities of broadcast, but emphasizing that Article 5 does not *demand* such a monopoly).

[81] *Id.* at 262–63.

[82] 12 BVerfGE at 261.

[83] *Id.*

avoid dominance by a single social or political group and to achieve a fair representation of the diversity of viewpoints held by the people at large.[84] The opposite model, the "externally pluralistic model," paradigmatically embodied by the press, depends on the existence of a large number of media speakers to ensure proper balance and diversity of opinions.[85]

In 1961, the Court did not view the state monopoly model as a structure mandated by the Basic Law, but rather as one possible response to the special nature of the contemporary structure of broadcast.[86] The Constitutional Court did not contemplate the possibility of broadcasting by a large number of private stations, such as that which exists in the United States and Germany today. This excusable failure of imagination may have contributed to the Constitutional Court's use of language that, read out of the historical context described above, seems to suggest that diversity in broadcasting is achievable *only* through legislative action, be it geared toward public or private television stations. The Constitutional Court stated:

> At any rate, Article 5 of the Basic Law demands that this modern instrument of forming opinions not be handed over to the state or one single social group. Broadcast stations must, therefore, be organized in such a fashion as to enable all relevant forces to have an influence over the stations and to be heard in the overall programming. *For the content of the overall programming, binding guiding principles must be established in order to guarantee a minimum balance of content, rationality, and mutual respect.* This can only be guaranteed when such organizational and substantive guiding principles are made generally binding through laws. Article 5 of the Basic Law therefore demands passage of such laws.[87]

The Constitutional Court probably found it unnecessary to reiterate that its call for binding principles applied to the concrete conditions of Germany at the time (i.e., no diversity of broadcast outlets). Without this empirical premise, however, the opinion sounds as if the freedom

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[84] Herzog, *supra* note 23, at 76a–77.

[85] *Id.*

[86] 12 BVerfGE at 262. "[I]t is by no means true that Article 5 of the Basic Law necessitates the creation of such a monopoly in the country." *Id.*

[87] *Id.* at 262–63 (emphasis added).

of broadcast demanded legislation irrespective of the specific realities of broadcasting in 1961.

Thus, the first broadcast opinion is one that can easily be misunderstood. On the one hand, the Court found that the Basic Law tolerated, but did not demand, the public monopoly; the possibility of private broadcasting was explicitly given constitutional sanction.[88] More importantly, the Court found freedom of the press and freedom of broadcast to be inherently equivalent, serving the same purpose and protecting the same interests.[89] The fact that the reality of broadcasting in contemporary Germany was vastly different from that of the press in the early 1960s, however, made it permissible to rely on the state for achieving the constitutional purpose.

On the other hand, the Court used language that in subsequent decisions allowed the demand for legislative action to be pushed beyond merely a solution to a specific problem.[90] A historically contingent demand for legislative action would later be transformed into an inherent characteristic of the freedom of broadcast.[91] The duty to legislate and the duty of state intervention, captured in the expression "serving freedom,"[92] was to become a constitutionally entrenched principle.[93]

2. The Entrenchment of the Duty to Legislate

Ten years passed before the Constitutional Court again encountered the broadcast issue. The issue facing the Court in 1971 was the constitutionality of a new tax law.[94] This law declared that the activities of broadcast stations were commercial or professional in nature, thus subjecting these stations to taxation.[95] The Court held that broadcast stations—both radio and television—are public trustees, fulfilling a public function and providing an integrating role for the whole nation.[96] Therefore, the Court concluded that their activities could not

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[88] *See id.* at 262.
[89] *See id.* at 260–61.
[90] *Id.* at 262–63.
[91] *See, e.g.*, 31 BVerfGE at 325.
[92] *See, e.g.*, 83 BVerfGE at 295.
[93] *Id.*
[94] 31 BVerfGE at 315.
[95] *Id.*
[96] *Id.* at 329.

be characterized as commercial or professional, and the stations could not be taxed.[97]

In holding that broadcast performs a public service, the Court moved beyond the permissive and flexible approach of the 1961 decision.[98] While in the earlier decision, the differential treatment of broadcast and press was recognizably a reaction to the different realities of the two media, this empirically based differentiation receded into the background in the later decision.[99]

The Court mentioned three rationales that justified a special treatment for broadcast. These three rationales were: (1) the potentially dangerous power and influence of broadcast; (2) spectrum scarcity; and (3) economic scarcity.[100] Rationales two and three are lifted directly from the 1961 opinion; the Court does not elaborate on them any further.[101] The first rationale, concerning the dangerous power of broadcast, had not appeared in the earlier decision. The Court used this argument aggressively for the purpose of foreclosing any constitutional presumption in favor of a laissez-faire regime of broadcast, holding that such a regime would be unconstitutional. Specifically, the Court stated:

> Not least due to the developments of television technology, broadcast has become one of the most powerful means of communication, as well as one of the most powerful mass media. Because of its far-reaching effects and potentials, as well as because of the danger of misuse for the purpose of exercising one-sided influence over public opinion, broadcast *cannot* be given over to the free play of forces.[102]

The second broadcast opinion combined its demand for legislative structure with the public trustee model of the broadcast stations.[103] It viewed the public broadcast stations as delegates of the states that fulfilled a constitutionally mandated public service.[104] As a result, the states were now faced with the challenge of drafting specific laws that would guarantee representative diversity and pluralism in program-

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[97] *Id.* at 329–30.

[98] *See* 12 BVerfGe at 262.

[99] *See* 12 BVerfGE at 262; 31 BVerfGE at 325–26.

[100] *See* 31 BVerfGE at 325–26.

[101] *See id.* at 326.

[102] *Id.* (emphasis added).

[103] *See id.* at 329.

[104] *See* 31 BVerfGE at 329. There were still no private stations at the time of the Constitutional Court's 1971 decision. *See, e.g.*, 57 BVerfGE at 296–303.

ming,[105] while not violating the state involvement prohibition of Article 5.[106]

In 1981, the Court addressed broadcast issues for the third time in its history.[107] In that decision, the Constitutional Court held that private broadcasting was in principle constitutional and thus opened the door for a subsequent expansion of private, commercially financed television.[108] The constitutional concepts that the Court had previously forged in response to the public monopoly situation that existed through the 1970s now forcefully asserted themselves in the new era of rapid technological developments. Given that broadcasting was promising to become more diverse, by virtue of increasing numbers of private broadcasters and decreasing technological limitations on the number of available channels, a plausible response for the Court might have been gradually to shift the conceptualization of freedom of broadcast towards that of the press. Emphatically, this was not the course that

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[105] *See* 31 BVerfGE at 329.

[106] *Id.* The constitutional prohibition against state involvement is a difficult doctrine, given that the Court mandates state regulation of broadcast. On the one hand, the doctrine seems to have some bite. For example, in its first television opinion, the Court struck down federal laws organizing a new public broadcasting company because it would have been "completely in the hands of the state" and "an instrument of the federal government." 12 BVerfGE at 263. On the other hand, the state is under a constitutional mandate to regulate broadcast. *Id.* at 262–63; *see also* 31 BVerfGE at 329. Herzog attempted to accommodate the two opposed principles of mandated broadcast legislation and freedom from state interference in the following way:

> What is essential is the freedom of the mass media from influences by parliaments and governments, but not the currently prevalent legal structure of the public broadcast corporation. Put differently, the independence from the state is the crucial criterion, not the closeness of the relationship between the state and the broadcast stations. In other words, a broadcast station that is legally part of the state's administrative apparatus would be in accord with the intention of Article 5.2 as long as clear regulations enabled it to operate independent of directives issued by the state.

Herzog, *supra* note 23, at 72a. This distinction is less robust than Herzog seems to assume. Take the following passage from 83 BVerfGE at 326–27. After emphasizing the prohibition against state involvement, the Court held that the legislature may "select the social forces or groups who may participate in" private broadcasting, organized according to the internally pluralistic model. The Court continued: "It is constitutionally acceptable for the legislature to draw up a catalogue of locally relevant social forces and groups, as long as this selection is appropriate for guaranteeing balance and diversity." *Id.* But legislative regulation of diversity in broadcast *does* make broadcast "an instrument of the . . . government" (12 BVerfGE at 263) by any intelligible standard.

[107] *See* 57 BVerfGE 295.

[108] *Id.* at 326. The Court declined to address the question whether there is a constitutional right to private broadcasting stations, *id.* at 318–19, examining only whether a state law permitting and structuring such private stations passed constitutional muster. *Id.* The Court found the law to be unconstitutional because it did not provide for sufficiently stringent control of private broadcasters. *Id.* at 326–35.

the Court chose. Instead, the Court irreversibly transformed the freedom of broadcast into a freedom explicitly and directly in the service of the values underlying Article 5.[109]

After the 1981 decision, freedom of broadcast shared few similarities with the traditional freedom of the press, in terms of the right to be free from government regulation and intrusion. Freedom of broadcast became a subordinate interest in the service of a greater good, namely, helping the public to form opinions:

> [T]he freedom of broadcast is primarily a freedom . . . *in service of* the freedom of opinion formation. Under the conditions of modern mass communication, the freedom of broadcast constitutes a necessary supplementation and reinforcement of the freedom of opinion formation; the freedom of broadcast serves the task of guaranteeing free and comprehensive opinion formation through broadcast.[110]

The Court thus dismissed the libertarian approach and held that the Basic Law *required* legislative supervision of broadcast.[111] Explaining the new doctrine, the Court briefly mentioned the classic interpretation of freedom of expression as a guarantee of freedom from state interference, but then explained why this interpretation cannot be controlling for broadcast:

> The free individual and public formation of opinion by means of broadcast demands first that broadcast be free from domination and intrusion of the state. In this way, the freedom of broadcast, like the classical libertarian rights, is defensive in its meaning. *However, the value to be pursued is not yet guaranteed by freedom from state interference.* Mere freedom from state interference does by itself not mean that free and comprehensive opinion formation through broadcast becomes possible; this task *cannot* be accomplished through a merely negative constitutional structure. Rather, what is needed is a *positive order* that ensures that the multiplicity of existing opinions is expressed through broadcast in the greatest possible breadth and completeness, and that thereby compre-

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[109] *Id.* at 320. The Court does not make a distinction, for purposes of its conception of the freedom of broadcast, between cable and non-cable transmission of the broadcast signal. *See, e.g.*, 90 BVerfGE 60.

[110] 57 BVerfGE at 320.

[111] *See id.*

> hensive information is offered. In order to accomplish this, substantive, organizational and procedural regulations are necessary that are designed according to the task of the freedom of broadcast and are therefore able to accomplish that which Article 5.1 of the Basic Law is supposed to guarantee.[112]

This passage sums up the Court's modern position on the issue of freedom of broadcast. Laissez-faire is decisively rejected, state regulation is embraced. The result is a highly complex and surprisingly intrusive constitutional jurisprudence that necessitates an examination of the details of state legislation to ensure that every facet of the legislation does indeed serve public opinion formation.

In the next broadcast opinion,[113] its fourth overall, the Court provided a more elaborate articulation of the constitutionality of private broadcasting.[114] While affirming the constitutional permissibility of private broadcasting,[115] the Court held that, if a state legislature decides to allow private broadcasting, it must sufficiently regulate the private broadcasters:

> The legislature, however, is free to choose other structures as long as it guarantees through appropriate regulations that the totality of the domestic broadcast offerings in fact essentially corresponds to the existing diversity of opinions. If the legislature wishes to create and maintain freedom of broadcast through external ("externally pluralistic") diversification, then even this solution does not make the need to secure the freedom through law and regulation superfluous.[116]

In order for the lack of internal regulation of private broadcasters to be constitutionally acceptable, the public broadcast stations must first guarantee a so-called "basic service" of broadcasting.[117] Basic service entails the "classic task" of broadcast, consisting of its role in the formation of opinion and of political will, but also going beyond entertainment and reporting of current affairs to include the "cultural responsibility" of broadcast.[118] Basic service is that type of programming

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[112] *Id.* (emphasis added).
[113] *See* 73 BVerfGE 118.
[114] *See generally id.* at 152–60.
[115] *Id.* at 157.
[116] *Id.* at 153.
[117] *Id.* at 157–59.
[118] 73 BVerfGE at 158.

that the private stations cannot deliver due to their market orientation.[119]

Once basic service is guaranteed, a legislature may relax its regulation of private broadcasters.[120] Relying, in a very limited fashion, on the diversification among stations to provide the requisite breadth and plurality of opinions constitutes somewhat of a departure from the Court's previous iron control over all of broadcast and the Court's insistence on an *a priori* guarantee, through legislation, of a constitutionally acceptable end result.[121] The Court conceded that its ruling constituted somewhat of a departure from its earlier holdings concerning the unacceptability of *any* imbalances in private broadcasting.[122] The Court acknowledged, however, that a perfectly balanced broadcast offering is neither achievable nor exactly definable.[123] Given this built-in indeterminacy, minor and insignificant imbalances arising within private broadcasting are acceptable, as long as the overall legislative regime is designed constantly to optimize balance and pluralism.[124] Thus, a legislature opting for the externally pluralistic[125] system must design a set of laws that allows the enforcement of a basic standard of evenly balanced pluralism.[126] As the Court emphasized in a 1991 decision, Article 5 is violated if this standard is not satisfactorily provided:

> As a serving freedom, [the freedom of broadcast] is granted not primarily in the interest of broadcasters, but rather in the interest of free individual and public opinion formation. The legislature is, therefore, under a duty to structure the broadcast system in such a way as to guarantee that this goal is reached.[127]

The Court continued:

> The Basic Law does not prescribe models for the structure of broadcast, but only a goal: the freedom of broadcast. Broadcast must be able to fulfill its task of serving free individual and public opinion formation. This task is independent of

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[119] *Id.* at 155–56.

[120] *Id.* at 153, 158–59.

[121] *Id.* at 158–59.

[122] *Id.* at 159.

[123] *See* 73 BVerfGE at 159 ("Evenly balanced multiplicity of opinions cannot . . . be understood as a measurable and exact standard").

[124] *See id.*

[125] *Id.* at 153.

[126] *Id.* at 160.

[127] 83 BVerfGE at 315.

> any specific [organizational] model. Every form of broadcast organization that makes the accomplishment of this task possible is constitutional.[128]

The legislature may choose a broadcast model in which with the public stations provide basic service, while the private stations operate under a less stringent regulatory regime.[129] The legislature, however, is not *obligated* to do so. If it desires, the legislature can choose an internally pluralistic structure and regulate all relevant features of each private broadcaster.[130]

C. *The Constitutional Court's Rationales for Different Treatment of Broadcast and Press*

How does the Constitutional Court justify such a high level of mandated legislative intrusion into the broadcasting process? Do its rationales make sense?

As discussed above, in its earliest encounters with issues arising under the freedom of broadcast in 1961 and 1971, the Court dealt briefly with the question of how to justify the regulations it imposed.[131] "Technical reasons" and the "large financial investment" necessary to start a broadcast station are mentioned in passing as explanations for the different treatment of broadcast and press.[132] In 1961, the Court elaborated on these "technical reasons," stating that chaos in electromagnetic spectra can only be avoided if all use of these spectra is regulated by the federal government.[133] In both 1961 and 1971, the Court did not attempt to justify the public character of German broadcast. The primary reason for this lack of justification is that the public nature of broadcast was paradigmatic in Germany at the time; an alternative regime of multiple private offerors was hardly imaginable, and it certainly had no relevance for the reality of contemporary broadcast organization.[134]

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[128] *Id.* at 316.

[129] *See id.* at 316–17. This holding means that the option of an externally pluralistic organization does not constitute any presumption in favor of a press-like regime. In fact, the opinion forcefully rejects any such implication by giving legislatures full freedom of choosing any broadcast model, from public monopoly to dual model. *See id.*

[130] *See id.*

[131] *See* 12 BVerfGE at 261; *see also* 31 BVerfGE at 326.

[132] 12 BVerfGE at 261; 31 BVerfGE at 326.

[133] 12 BVerfGE at 230.

[134] In summarizing the position and meaning of broadcast in and for the German nation, the Court wrote:

By the time of the third broadcast decision in 1981, the situation had changed. As the Court then recognized, the technological and economic reasons for treating broadcast differently from the press were rapidly disappearing.[135] Nevertheless, the Court kept the stringent regime of requiring legislation fully in place.[136] By developing the concept of freedom *in service of the values of* pluralism and balanced opinion formation, the Court adapted the idea of broadcast as a matter of public responsibility for the new age of a potential multitude of broadcast offerors.[137]

The Court's analysis is especially interesting because the Court de-emphasized the economic and spectral scarcity rationales.[138] Instead, the Court chose an approach that could not be made obsolete even by revolutionary technological developments. Thus, the Court's analysis remains applicable even in a world where electronic communication is not impeded by any kind of economic scarcity or scarcity of capacity.[139]

The Court's scarcity-independent justification for its freedom of broadcast regime is based on a shift of the locus of distrust. Whereas, in traditional free speech theory, it is the government that is distrusted and restricted, the value-based free speech theory distrusts everything that is private, uncontrolled by official rules, unassociated with the state, and not part of a system that can be subjected to rational rules maximizing values determined by an intellectual elite. The Court's approach exemplifies this shift. Stated in a simplified way, the Court distrusts everything and everybody except itself and, with provisos, the

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> In Germany, broadcasting has since 1926, traditionally fallen under the responsibility of public administration. . . . After 1945, the view of broadcast as a public responsibility was strengthened because broadcasting was given over to public corporations. . . . In sum, broadcast in Germany has become a public institution and a public responsibility.

12 BVerfGE at 244–46.

[135] *See* 57 BVerfGE at 322–23.

[136] *See id.* at 322.

[137] *See id.* at 321–22.

[138] *See id.*

[139] *See id.* at 322. In its opinion, the Court stated:

> [T]he necessity of legislation regulating [broadcast] continues to exist even when the special situation of broadcast, caused by frequency scarcity and by the high financial investment necessary for engaging in broadcasting, is obviated by virtue of modern [technological] developments.

Id. It is in this way that the Constitutional Court's analysis and those of Fiss and Sunstein are closely related. They justify state involvement in private speech by means other than reference to economic and technological shortcomings.

legislatures. Specifically, the Court distrusts the following entities to uphold the values protected by Article 5: (1) private broadcasters; (2) the market; and (3) the people.[140] These three entities cannot assure that a democratically acceptable and desirable mix of opinions and viewpoints will be presented in the broadcast media. While there may be cause to assume that private broadcast will develop a level of pluralism similar to that among large newspapers, such a development is not sufficiently *guaranteed.*[141] One future scenario may be a desirable marketplace of ideas, but another might be a dangerous concentration of speech power in the hands of very few broadcasters. Thus, public opinion might be thrown out of balance. For this reason, a wait-and-see approach is not feasible. Pathological developments in this area are, according to the Court, reversible only under extreme difficulty, if at all.[142] The possibility of a few powerful, private individuals taking control of German public opinion must be banned as thoroughly as possible.[143] Therefore, the Court eschews the "experimental" approach of allowing the broadcast system to monitor itself and instead adopts the method of "guaranteeing" the precious democratic value of freedom of broadcast by designing a complex constitutional system and enlisting the full legislative power of state governments to bring about its realization.[144] Security and certainty with respect to committing broadcast to fundamental democratic and free speech values must be created through state action, supervised by the Court.[145]

The Court never examines its assumption that state power ensures more reliably than a free market approach that freedom of expression rights will be honored.[146] The Court believes that relying on state action is somehow less risky and less dangerous than relying on the private sector. Given the abuse of state power in Germany's own immediate history, it is surprising that these judges, genuinely committed to democracy and the liberal values of the Basic Law, would turn enthusiastically to the state and away from the market and the people. There is not a single passage in any of these opinions assessing and comparing the risks inherent in a basically state-free system with the risks inherent in a system that is structured by legislation and supervised by a sub-

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[140] *See generally* 57 BVerfGE at 320–24.

[141] *Id.* at 320; *see also* 83 BVerfGE at 315.

[142] 57 BVerfGE at 323.

[143] *Id.* at 323–24.

[144] *See id.* at 320.

[145] *See id.*

[146] *See id.* at 320–24.

stantial administrative apparatus. The flaw in the Court's approach lies in its unwavering faith in the state's ability to bring about the desired ends with near-certainty and minimal risk.[147]

The following problems of private broadcast arise, according to the Constitutional Court, even if no scarcity problems limit the numbers of broadcasters:

> . . . [O]ne cannot expect private broadcast to offer programming with broad and diverse contents because private offerors finance their broadcasts virtually exclusively through income from commercial advertising. This income can only be sufficiently high when the private programs achieve sufficiently high ratings. Therefore, private broadcasters are under an economic necessity to produce programs that are attractive to the masses, that are successful in maximizing the numbers of viewers and listeners, and that are as cheap as possible. Programs that are of interest only for a small portion of the audience and that are often very expensive—such as demanding cultural programs—can be expected to become rare, if not to disappear altogether. However, only with their presence can the whole breadth of comprehensive information be achieved, without which opinion formation as guaranteed by Article 5.1 Sentence 2 of the Basic Law cannot exist.[148]

This critique is not inherently implausible. A broadcast market may have certain systemic weaknesses in its offerings for which a government may legitimately wish to compensate by running non-commercial stations. However, by constitutionalizing a much more radical remedy than the mere provision of supplemental public channels, that is, by reading Article 5.1 as *requiring* all of broadcast to present the "whole breadth of comprehensive information," the Court locks the system of legislative responsibility for broadcast into place and permanently excludes a more libertarian approach.[149] Once the perceived flaws of a press-like broadcast structure are constitutionally entrenched as foun-

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[147] *See* 57 BVerfGE at 320–24.

[148] 73 BVerfGE at 155–56. The Court reaffirms its position in 83 BVerfGE at 311.

[149] *See id.* In a more recent decision, the Court, after reaffirming the service character of the freedom of broadcast, repeated the constitutional demands on the overall broadcast offering: concrete breadth of all sections of the program and a representation of a balanced plurality of the opinions found in society at large. 87 BVerfGE 181, 197 (1992). The Court continued by

dational rationales for the service conception of the freedom of broadcast, the whole regulatory system becomes shielded from empirical evaluation.[150]

D. *Roman Herzog: The Limitations of a Pragmatic Commentator*

The entrenchment of this constitutional system plays out interestingly in the writings of the former President of the Constitutional Court, leading commentator on its Article 5 jurisprudence, and current President of the Federal Republic of Germany, Roman Herzog. Herzog has participated in the Constitutional Court's broadcast decisions since 1986. His extensive and constantly updated commentary on the broadcast question, which is part of the leading treatise on the Basic Law, provides insight into the thinking of Germany's most influential jurist in this area.[151]

In his commentary, Herzog resists the notion that the concept of basic service constitutionally mandates the maintenance of public stations under all factual circumstances.[152] Herzog believes that the "basic service" that the public stations provide should be a dynamic concept, one that cannot be defined for the future and must constantly be ascertained anew.[153] According to Herzog, there are two ways of achieving the constitutional aim of realizing the values underlying Article 5.1: by keeping basic service within the domain of the public stations, or by strengthening the programming requirements for private stations by way of legislation so they will deliver basic service.[154] The current realities of German broadcasting, however, make the second approach highly unfeasible.[155]

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citing to its 1986 broadcast opinion, 73 BVerfGE at 155–56, for the proposition that the commercial nature of private broadcast inherently disables it from meeting these demands. 87 BVerfGE at 199. Thus, a coexistence of public and private broadcast is constitutionally acceptable *only if* (a) the imbalances of private broadcast do not become significant, and (b) the public stations fully live up to the constitutional mandate and provide basic service to the population. *Id.* at 198–200.

[150] The same problems—naive reliance on governmental institutions and systematic disregard for empirical complications—beset Fiss's First Amendment theory. *See infra* notes 324–54 and accompanying text.

[151] *See generally* Herzog, *supra* note 23.

[152] *Id.* at 79.

[153] *Id.*

[154] *Id.* at 78–78a. Notably absent is the option of lowering legislative control and permitting viewers' choice and competition among many private offerors to replace state-"guaranteed" diversity and quality. *See id.*

[155] *Id.* Herzog may well be correct: basic service perhaps does not constitutionalize the existence

Herzog is a pragmatist. In his interpretation of the Court's rulings, he is intent on softening dogmatic pronouncements of the Court and on giving them a flexible dimension and allowing future empirical changes to bring about adaptations in constitutional law. Herzog disagrees with the pronouncement of the Constitutional Court's 1981 broadcast opinion,[156] which held that the choice of broadcast structure—internally or externally pluralistic—must be determined by the legislature under all circumstances.[157] Instead, Herzog views this holding as limited to a period of transition from a time of technical limitations to a time where such limitations have become immaterial.[158] Upon the disappearance of most or all technological scarcities, Herzog would view the orthodox internally pluralistic model as unconstitutional.[159]

Herzog stops short, however, of endorsing the assimilation of the freedom of broadcast into the traditional freedom of the press even in a situation where there are no scarcities. Instead, Herzog simply asserts that there is a "central constitutional difference" between the press and film on the one hand, and broadcast on the other.[160] This difference consists of the assumption that balance and diversity are maintained automatically and without Court and state interference in press and film, while, with respect to broadcast, the legislatures are under a mandate to supervise and correct.[161] True, this has been the Court's position.[162] But why? Should Herzog's thinking about the potential unconstitutionality of internal regulation of private broadcasters, absent significant scarcities, not lead him one step further and predict the end of the "central constitutional difference"? Regrettably, Herzog, like the Constitutional Court, does not even begin to engage in a comparative risk analysis of private versus state agency with respect to free speech.

Instead, Herzog retreats to the two rationales discussed above, the need for guarantees and the inherent weakness of private unregulated broadcasting.[163] In summarizing these two rationales, Herzog crystal-

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of public broadcasting. But what the concept of basic service does accomplish is to constitutionalize the fundamental regulability of all broadcasting. *See id.*

[156] 57 BVerfGE at 325.

[157] Herzog, *supra* note 23, at 78–78a.

[158] *Id.* at 75–75a.

[159] *Id.* at 77–77a.

[160] *Id.* at 77.

[161] *Id.*

[162] *See, e.g.*, 57 BVerfGE at 322–24.

[163] Herzog, *supra* note 23, at 77–77a.

lizes their weaknesses.[164] First, Herzog considers the relationship between balanced programming and the externally pluralistic arrangement of private broadcasting.[165] Herzog correctly perceives a tension between the continuing constitutional demand for state supervision over all programming and the externally pluralistic structure.[166] Full realization of either element will annihilate the other: a purely externally pluralistic structure—as in the press—leads only to the possibility, but not to the guarantee, of sufficiently pluralistic and balanced programming.[167] On the other hand, pervasive state regulation would mean the death of the externally pluralistic model.[168] Therefore, according to Herzog, the impulse towards a press-like structure and the need for a guarantee of constitutionally appropriate programming must be balanced against each other and brought into unison as much as possible so that both can have the greatest possible effect.[169]

Second, Herzog dismisses commercial private broadcast as being "the last thing one could wish for Germany."[170] This quotation refers to the familiar complaint that commercial television is shallow and inattentive to public issues.[171] This complaint, however, is often unexamined; it typically remains a mere assertion. Elitist undercurrents, which always seem to underlie this complaint,[172] can be perceived in both the writings of the Constitutional Court and of Herzog. The Constitutional Court fears that commercial broadcasting will lead to a significant reduction of "demanding cultural programs."[173] Herzog remarks at one point, with intentional irony, that a station's dependency on commercials and thus on ratings does not permit programming on a "particularly high" level.[174] This is essentially the same concern as that

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[164] *See id.*

[165] *Id.*

[166] *Id.* at 77a.

[167] *Id.* Not even as clearsighted a commentator as Herzog challenges the premise that state involvement in this area can *guarantee* anything (beyond weakening the defensive dimensions of the right to free speech). *See id.*

[168] Herzog, *supra* note 23, at 77a.

[169] *Id.* Herzog does not mention the alternative conclusion that regulation and the "externally pluralistic" model are ultimately incompatible and that regulation must stop once there are enough private broadcast offerors. *See id.*

[170] *Id.* at 80d.

[171] *See, e.g.*, 73 BVerfGE at 155–56.

[172] Sunstein, as I shall argue below, is no exception in this regard. *See infra* notes 397–466 and accompanying text.

[173] 73 BVerfGE at 155–56. The Constitutional Court, of course, does not define "demanding cultural programs" or explain why such programs are preferable. *See id.*

[174] Herzog, *supra* note 23, at 78.

voiced by the Constitutional Court,[175] and not the type of empirical assessment on which constitutional theories should be erected. The Constitutional Court's and Herzog's elitist presumptions remain unexamined. The factual basis of the resulting claims is therefore dubious.

Both the insistence on a guarantee of constitutionally acceptable programming, and the belief in the low-quality output of commercial television are, in the end, results of a reluctance to trust viewers to make the right decisions on their own. They show a conviction that the state is preferable to the people in fighting for democracy and pluralism. Why the people are untrustworthy, whether commercial broadcast output is or must be inferior to state-prescribed output, and, most importantly, why the state, of all things, should be the entity on which to rely when problems are projected to arise in a laissez-faire free speech regime—these questions remain unanswered.

E. *The Reality of State Regulation of Broadcast: Legislation and Judicial Supervision in Germany*

Under the Constitutional Court's analysis, freedom of broadcast is a set of abstract norms to which program offerings must conform.[176] The resulting idea of freedom as service necessitates pervasive state involvement. The traditional right to free speech has been turned on its head.

The Court's 1991 broadcast decision affords an excellent opportunity for studying the governmental regulations that result from such a reversal of the libertarian free speech conception.[177] In 1991, the Court examined and largely upheld the constitutionality of a state's legislation prescribing an internally pluralistic organization of private broadcasting.[178] Legislation of this kind is insidious. The broadcast realm becomes pervaded by state-created value judgments as to what constitutes rich and comprehensive public debate and which voices are properly heard and suppressed in the public forum. Inevitably, the state becomes the provider of values for its citizens.

1. Content Regulation of Private Broadcasting

In its 1991 decision, the Constitutional Court upheld a state law that defined the substantive parameters for private broadcasters in the state

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[175] 73 BVerfGE at 155–56.

[176] *See, e.g.*, 57 BVerfGE at 319–20.

[177] 83 BVerfGE 238.

[178] *Id.* at 295–341.

of Northrhine-Westphalia.[179] These provisions are interesting and worthy of full citation. The government-created list of values that must be honored by private broadcasters constitutes an official espousal of a certain perspective on what is desirable for society and democracy.[180] By ruling that the following provisions regulating private broadcasting in Northrhine-Westphalia were constitutional, the Court essentially endorsed a governmentally created ethics of human interaction:

> § 11
> Programming Mission
> [Broadcast is] a medium of and factor in the process of the free formation of opinion and thus is of concern to the general public; in this way broadcasters fulfill a public function. Broadcast programs . . . must contribute to comprehensive information and free individual and public opinion formation. Broadcast programs must serve education, counseling, and entertainment; they must fulfill the cultural task of broadcast. Every broadcast channel must devote attention to public events in Northrhine-Westphalia.
> § 12
> Basic Tenets of Programming
> (1) All broadcast programs must conform to the constitutional order. The provisions of the general laws and the laws for the protection of personal honor must be respected.
> (2) Broadcast programs must respect the dignity of the human being. They ought to contribute to a strengthening of the respect for life, liberty, physical inviolateness, and the faith and opinion of others. The moral and religious convictions of the population, as well as marriage and family, must be respected. Broadcast programs ought to foster understanding among nations, they ought to admonish people to pursue peace and social justice, they ought to defend the democratic freedoms, they ought to contribute to equality between men and women, they ought to be committed to the truth. No broadcast program may take into account only one-sided and isolated opinions. No broadcast program may serve, in a one-sided fashion, one party, one group, one interest, one denomination, or one world view.

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[179] *Id.* at 315–24.
[180] *Id.* at 249–50.

> (3) In fulfilling its mission, every station's overall offering must express the diversity of opinions as broadly and completely as possible. The significant political, ideological, and social forces and groups must be represented in every station's overall offering. Every station's overall offering must provide appropriate time for the treatment of controversial themes of general significance.
> (4) Informational programs must respect recognized journalistic principles. News must be general, independent, and rational. Before they are aired, news programs must be checked concerning their content, origin, and truth, as far as the circumstances allow. Commentaries must be separated from the news in a clear fashion, and they must be labeled as such, giving the name of their authors.[181]

These legislative enactments are more than politically correct sermonizing. The state makes decisions as to what values should be espoused on all private broadcasting; competing or conflicting standpoints are explicitly excluded and outlawed. Section 12(2)[182] is a dramatic infringement on editorial freedom and an attempt by the state to control the messages of a whole medium.[183] What is surprising about this list of demands is not its general tenor—its labored inoffensiveness in favor of freedom, democracy, objectivity, truth, diversity, and family values—but its specificity. Private broadcasters must respect human dignity, the ethical and religious convictions of others, and the institutions of marriage and family.[184] They must contribute to international understanding and to equal rights between men and women.[185] They may not run a single program that espouses only one viewpoint.[186]

But what about those who do not respect marriage, family, and the religious convictions of the majority, viewing an appeal to these institutions and beliefs to be ideological warfare on their non-traditional lifestyles? Those who find the expression "social justice" to be an emotional rallying cry of "bleeding-heart" liberals, a cry that may lead to ill-considered legislation with dangerous unintended consequences and that must be kept in check by cool economic reasoning? Those

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[181] *Id.*
[182] 83 BVerfGE at 249.
[183] *See id.*
[184] *See id.* at 249–50.
[185] *See id.*
[186] *See id.*

who believe that broadcasting extreme viewpoints grabs people's attention and stimulates opponents to put forth their best arguments? Those who seek radical political change and thus wish to challenge the "constitutional order"? Thus, the gay activist, the hard-core libertarian, the political commentator with a strongly partisan agenda, or the socialist are systematically discriminated against in the name of liberal democratic inclusiveness.

The law demands that broadcast programming be committed to tolerance and respect for others, balance of viewpoint, and objectivity.[187] Partiality and one-sidedness are unlawful and, ultimately, unconstitutional.[188] This plainly creates the danger that broadcasters will avoid controversial programming and prevent strongly one-sided views from being expressed on the air. After all, any station that allows a program to take a strong stance on one side of an issue might, by adversaries of that stance, be accused of failing to meet the legal requirements of breadth, completeness, and balance. Perhaps in order to forestall this problem, the law includes a requirement that controversial themes be appropriately covered.[189] But this provision calls only for "appropriate" coverage of "controversial" topics of "general" interest, without defining these terms.[190] The controversy coverage requirement can thus be expected to be virtually meaningless.[191]

The danger of chilling speech (and perhaps even more of "dumbing down" speech, of making public discourse increasingly banal) by requiring balance and fairness is great. In his commentary, Herzog freely admits that the chilling of speech is an unfortunate but inevitable side effect of an "internally pluralistic" structure of broadcast, such as the one chosen by the state of Northrhine-Westphalia for its private broadcasters.[192] What is perhaps most stunning about Herzog's admission is how matter-of-factly and uncritically it is given.[193] Herzog simply describes a reality; he demonstrates no awareness that state-caused chilling of sharply partisan speech is a fundamental indictment of any free speech order.[194] This is surprising in light of the fact that Herzog is not an adamant pro-regulation ideologue; on the contrary, he is a clear-

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[187] *See* 83 BVerfGE at 249–50.

[188] *See, e.g., id.* at 297.

[189] *See id.* at 249.

[190] *See id.*

[191] *See id.*

[192] Herzog, *supra* note 23, at 72.

[193] *See id.*

[194] *See id.*

sighted moderate who cares very much about allowing pluralism to flourish and preventing a strict application of pro-regulation constitutional principles from choking off new developments.[195] Nevertheless, Herzog accepts without further comment or critique the limitations on vigorous speech that follow from an internal organization of broadcast stations:

> More importantly, from the demands that the Constitutional Court makes on the inner structure of broadcast stations follows not only an important guiding principle for the supervisors' exercise of authority, but also a significant limitation on the way in which the subordinates may exercise their rights: the Constitutional Court has held that, at least for public broadcasting, the balanced and reasonably objective information of the public is not achieved by the multiplicity of broadcast stations, but rather that such balance and approximate objectivity must be realized within every single broadcast station, that, in other words, tendencies and biases must be evened out within the individual stations. This principle has an effect on the relation between supervisors and their subordinates in broadcast stations. *In other words, the individual editor is to a much larger extent subject to criticisms of one-sidedness than this could be the case in the press or an externally pluralistic broadcast system. Under certain circumstances, it can be an irrefutable argument against airing his program that another program of the exactly opposite bias could, for whatever reasons, not be broadcast . . . .*[196]

There is no hint here that the costs of chilling speech might have to be weighed against the gains of legislating diversity. Herzog uncritically accepts these costs as natural consequences of the constitutional regime to which the Constitutional Court has committed itself. But the chilling of partisan speech is not some minor shortcoming that a free speech jurisprudence can simply overlook. It is a problem that strikes

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[195] *See, e.g., id.* at 74–74b. In this passage, Herzog criticizes the Court's belief that regulation and diversified editorial boards will lead to desirable programming. He argues that the unwieldy regulatory apparatus sanctioned by the Court is utterly unable to achieve the results naively envisioned by the Court. *See id.*

[196] Herzog, *supra* note 23, at 72 (emphasis added). Herzog addresses public stations here; however, his thoughts apply with equal force to similarly organized private stations. *See id.*

at the foundations of a constitutional order that allows such a problem to arise.

2. Legislating Diversity

The existence of legislatively created "diversity" regimes fosters the impression that the interests that must be included—and the resulting broadcast programming—*are* satisfactorily representative of diversity in Germany. Yet selectivity and exclusion are inevitable. The excluded groups and interests are therefore officially declared insignificant. This constitutes a more vicious and pervasive silencing than that effected by market operations, even insidious ones. When a television station in the United States withdraws a program on a controversial topic due to pressure from high-powered advertisers, the silencing is done out of purely commercial motives, motives to which no moral or societal authority attaches. Typically, the calculus of advertisers is simple. They do not want their products to be associated with certain controversial topics because that may hurt sales. The decision of the television station to withdraw the program may be cowardly, but it is nothing more than that. Furthermore, such a decision is itself likely to be the subject of media attention; news accounts of the event might bring the decision of the station managers to act as self-censors into the public eye and will give rise to discussions both about the actions of the parties involved and about the original controversy, the subject matter of the proposed program.[197]

The situation in Germany is different. A group that does not make it on a state's television diversity list is silenced by more than a simple commercial calculation. It is excluded by the reasoned judgment of the state.[198] If the Constitutional Court approves a state broadcast law, as it did in its 1991 broadcast opinion,[199] a group's exclusion becomes sanctioned by what is perhaps the most respected governmental organ

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[197] The events surrounding the April 30, 1997 episode of the ABC sitcom "Ellen" are a good example. In that episode, the lead character of the show, played by Ellen DeGeneres, announced that she was a lesbian. Several prominent conservatives, among them the Rev. Jerry Falwell, urged an advertising boycott of the episode. *See* Mark Landler, *Wave goodbye to the Bundys, blue-collar champions of the Fox network*, N.Y. TIMES, May 5, 1997, at D9. The reactions of advertisers to the "controversial" content of the show received considerable media attention. *See, e.g.*, Dana Canedy, *As the main character in "Ellen" comes out, some companies see an opportunity; others steer clear*, N.Y. TIMES, Apr. 30, 1997, at D8; Courtney Kane, *Only real surprise on "Ellen" was lineup of advertisers*, N.Y. TIMES, May 2, 1997, at D2.

[198] *See, e.g.*, 83 BVerfGE at 270–72.

[199] 83 BVerfGE 238.

in Germany. The group's exclusion is legalized, systemic, and pervasive. It gains a moral dimension. Furthermore, the exclusionary practice is made invisible by the constitutional claim that the resulting regime actually represents real diversity reflective of the population at large. Not to belittle the fight against cowardly advertisers and others interested in keeping controversy off the air in the United States, but the state-imposed pseudo-diversity of Germany presents problems of a much more severe and fundamental nature.[200]

The following state law regulating the composition of a supervisory and decisionmaking board that controls licensing and programming of private broadcasters meets the Constitutional Court's requirements of guaranteeing a fostering of the values of Article 5.1.[201] The law provides:

> § 55
> Composition of the broadcast commission, time in office of its members
> (1) The broadcast commission consists of 41 members. Women are to be appropriately taken into account in the selection of members . . . .
> (2) Eleven members are elected by the state parliament . . . .
> (3) Eighteen members are selected from among the following organizations [one member from each category]:
> 1. Protestants,
> 2. Catholics,
> 3. Jews,
> 4. and 5. members of various unions,
> 6. state employees,
> 7. employers,
> 8. manual workers and farmers,
> 9. professionals,
> 10. town and regional administrators,
> 11. people active in charities,

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[200] Sunstein's recently developed concept of "incompletely theorized agreements" allows him to address this problem head-on: "[I]ncompletely theorized agreements have the crucial function of reducing the political cost of enduring disagreements. If judges disavow large-scale theories, then losers in particular cases lose much less. They lose a decision, but not the world." CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 41 (1996) [hereinafter SUNSTEIN, LEGAL REASONING]. For a discussion of this new work and its relation to Sunstein's Madisonian commitments, *see infra* notes 259, 333, and 361.

[201] 83 BVerfGE at 332.

12. athletes,
13. consumers,
14. environmentalists,
15. young people,
16. homeland and folkloristic organizations,
17. the handicapped,
18. family or women's groups.

(4) One member is selected from the resident aliens . . . .

(5) Eleven further members are selected from the areas of publishing, culture, art and science, as follows:

1. a writer who is a member of the union for printing and paper,
2. a member of the broadcast-film union or of the organization of theater actors,
3. a musician,
4. a journalist,
5. a film or broadcast entrepreneur,
6. a sculptor,
7. a person who works in higher education,
8. an education administrator,
9. a newspaper publisher,
10. a member of the German Society for Media Pedagogy and Communication Culture,
11. someone active in public interest broadcasting or local broadcasting.[202]

The forty-one people selected under the law are responsible for ensuring that all relevant political and social positions and groups are appropriately represented in the overall programming of private broadcast.[203] In the process of upholding the law and accepting its strong focus on organized interests, the Constitutional Court explained that the legislature used the organizations named in the lists as proxies for

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[202] *Id.* at 271–72. In the interest of intelligibility, I have abridged the descriptions of most of the groups from which members are to be selected. Entry (3)-17, for example, does not simply read "the handicapped." Rather, it gives the precise organizations from which the handicapped are to be selected: "a member from the German Association of the Victims of War and Armed Service, the Handicapped and those receiving Social Security Payments, State Section of Northrhine-Westphalia, or from the Reich Association of the Victims of War, the Handicapped and those receiving Social Security Payments and the Survivors of Those Killed in War, State Section of Northrhine-Westphalia." All entries are in this form, that is, all entries name specific organizations from which members are to be selected.

[203] *See generally id.* at 332–35.

representative social interests.[204] The members of these organizations are not supposed to act in a partisan manner in favor of their specific organizations; rather, they are supposed to act as guardians of the public interest who contribute their specific experiences without engaging in interest politicking.[205]

Northrhine-Westphalia's broadcast law was challenged in court. The challenge issued from the political right, specifically, from Christian Democratic (CDU/CSU) members of the German parliament.[206] Among many other flaws the CDU/CSU found in the law, the conservative plaintiffs challenged what they felt was essentially an overrepresentation of liberal groups, in the contemporary American sense, and a concomitant underrepresentation of conservative groups.[207] The plaintiffs claimed in particular that the total absence of "Vertriebene" ("Expelled People")[208] among the members of the broadcast commission was evidently unconstitutional.[209] These Vertriebene are ethnic Germans, and their descendants, who lived in what was formerly Eastern Prussia, Silesia, the Sudetenland, and similar territories and who, at the end of World War II, fled from the advancing Red Army into what later became the Federal Republic of Germany.[210] The Vertriebene were and are a powerful conservative voice in German politics.[211] Not many conservative politicians have dared to affront this extremely vocal and well-connected group—which explains its substantial influence on conservative policy in post-war (West) Germany.[212]

At any rate, the state government of Northrhine-Westphalia did not include the Vertriebene in its broadcast diversity list.[213] Rejecting the conservative plaintiffs' argument that the exclusion violated the diversity requirement under the freedom of broadcast, as well as the equal protection provision of the Basic Law (Article 3), the Constitutional Court stated:

> The exclusion of the Vertriebene organizations in the broadcast commission does not violate [the equal protection provi-

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[204] *Id.*

[205] *Id.*

[206] 83 BVerfGE at 275–76.

[207] *Id.* at 283–85.

[208] *See generally* MARTIN A. LEE, THE BEAST AWAKENS 290–96 (1997).

[209] 83 BVerfGE at 285.

[210] *See generally* LEE, *supra* note 208, at 290–96.

[211] *See id.*

[212] *See id.*

[213] *See* 83 BVerfGE at 271–72.

> sion or the freedom of broadcast]. Rather, the legislature was permitted to assume that, 45 years after the end of the war, the Vertriebene are integrated into the society of the Federal Republic. Most of the Vertriebene are not distinguishable anymore by their financial situation. Rather, they are distinct from other social groups only by virtue of their geographic origin and the cultural peculiarities associated therewith. With respect to the second and third generation of Vertriebene, their expulsion and loss of homeland recede, as a rule, into the background to such a degree that there is no factual basis for differentiating them [as a distinct group].[214]

The Constitutional Court's reasoning behind its rejection of the CDU/CSU's argument simply does not make any sense. It is exactly the "cultural peculiarities" associated with their geographic origin, and their resulting political positions, that establish the Vertriebene as a significant interest group.[215] The statute, and the holding of the Constitutional Court, deny editorial participation in Northrhine-Westphalia's broadcast system to a discrete and powerful group on the basis of the facially absurd theory that a group must be distinguishable by its "financial situation" and loses its distinctiveness and relevance by virtue of the passage of time—in the case of the Vertriebene, no more than a few decades.[216] Under that theory, few interest groups are safe from judicial decertification. But the Constitutional Court's unprincipled diversity theory[217] is the inevitable result of centralized attempts to capture and replicate the complexity of society at large.[218] Ultimately, as in the case of the Vertriebene, judicial decisions about diversity cannot be explained by anything other than the judges' personal sympathies or antipathies toward specific groups.

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[214] *Id.* at 337–38.

[215] *See* LEE, *supra* note 208, at 290–96.

[216] *See id.*

[217] *See* 83 BVerfGE at 332–35.

[218] *See id.*

III. AMERICAN ARGUMENTS IN FAVOR OF MEDIA REGULATION

A. *The Basic Flaw*

In his concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, U.S. Supreme Court Justice Stewart stated:

> The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press . . . . Yet here the Court of Appeals held, and the dissenters today agree, that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment "values." The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters *are* Government. This is a step along the path that could eventually lead to the proposition that private *newspapers* "are" Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.[219]

Justice Stewart thus understood that the conceptual prerequisite for speech regulation is a substitution of the values protected by the right to free speech for the right to free speech itself.[220] As the example of the freedom of broadcast in Germany demonstrates, this substitution leads to a transformation of the constitutional rule largely prohibiting government action into a rule requiring government action. The value interpretation of the right to free speech does not constitute a mere relaxation or partial modification of the traditional understanding. A modified interpretation of free speech rules in certain instances might be integrated with little friction into a freedom of speech jurisprudence directed primarily at protecting against state intrusion.[221] The German-style conception of freedom of speech to which Justice Stewart

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[219] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 133 (1972) (Stewart, J., concurring).

[220] *See id.* Justice Stewart also understood that freedom of the press is gone once newspapers "are" government. *Id.* But transforming private newspapers into governmental actors for First Amendment purposes is exactly Sunstein's strategy. *See infra* notes 260–74 and accompanying text.

[221] *See, e.g.*, SUNSTEIN, DEMOCRACY, *supra* note 8, at 81–88.

objects, on the other hand, is in direct conflict with the traditional defensive rule against state action.[222]

B. *Cass Sunstein: Germany as an Ideal for a New First Amendment*

Professor Sunstein's book, *Democracy and the Problem of Free Speech,* is, according to Professor Amar, "a must read for anyone who wants to think seriously about the free speech issues facing this generation."[223] One can only agree with Amar's assessment. Sunstein's approach is broad, ranging from empirical analysis to high theory.[224] He attempts a "New Deal for speech,"[225] a reconceptualization of the First Amendment from a laissez-faire structure into a system that pursues more rationally what he calls "Madisonian" values.[226] The New Deal for speech is an attempt to broaden dramatically the ability of the state to regulate certain speakers, particularly broadcasters and other mass media. Sunstein cites approvingly to the German Constitutional Court and to Supreme Courts of other European nations to support his new ideas about freedom of press and broadcast.[227] Sunstein tries to blend the radical pro-regulation approach exemplified in the Constitutional Court's broadcast jurisprudence with conventional American First Amendment notions. His New Deal synthesis relies in large part on integrating core ideas practiced by the Constitutional Court into the exist-

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[222] *See Columbia Broadcasting System,* 412 U.S. at 133.

[223] SUNSTEIN, DEMOCRACY *supra* note 8, on dust cover.

[224] *See generally id.*

[225] *Id.* at ch. 2, *passim.*

[226] Sunstein describes these Madisonian core values in the following way:

> The system of free expression is the foundation of [the process of public deliberation]. One of its basic goals is to ensure broad communication about matters of public concern among the citizenry at large and between citizens and representatives. Indeed, we might even define political truth as the outcome of this deliberative process, assuming that the process can approach or meet the appropriate conditions. Those conditions include adequate information; a norm of political equality, in which arguments matter but power and authority do not; an absence of strategic manipulation of information, perspective, processes, or outcomes in general; and a broad public orientation toward reaching right answers rather than serving self-interest, narrowly defined. It is not necessary to claim that the result of any such deliberative process will be unanimity or even consensus. Sometimes people genuinely disagree, and discussion will not bring them together. It may even tear them apart. We should also acknowledge that real-world processes do not conform to these conditions. But under the right circumstances, the system of public discussion should improve outcomes and help move judgments in appropriate directions.

SUNSTEIN, DEMOCRACY, *supra* note 8, at 19.

[227] *See id.* at 77–81.

ing First Amendment framework in a way that leaves the framework nominally unchanged but substantively revolutionized.

Sunstein provides the following perceptive description of the current media situation:

> All in all, we have extraordinary diversity in speech outlets. Some current critics speak of "monopoly" of the broadcast or print media; but there are no real monopolies here. Many people, and many points of view, are able to have access to some part of the media. On every important count, a market system of this kind is much better than a system of centralized government control of speech. For this reason, it sometimes seems as if we are and should be, moving toward a conception of free expression in which the dominant understanding is one of antitrust law. Once we have broken up all interferences with the operation of the free market, and ensured against any vestige of monopoly, our free speech problems will be solved.[228]

Of course, even a functional system like the one just described can have weaknesses, possibly severe ones. Sunstein provides many interesting practical strategies for reform, some of them less intrusive, some of them involving extensive government action.[229] Overall, Sunstein succeeds in "suggest[ing] possibilities that should be thought consistent with the [traditional] First Amendment, not to defend an entirely new regulatory system."[230] Sunstein correctly cautions against a reflexive and unthinking First Amendment dogmatism when he states:

> What specific strategies for reform might emerge in the United States? The most important point is that the First Amendment should not operate as a talismanic or reflexive obstacle to our efforts to experiment with different strategies for achieving free speech goals. We should look carefully at the real-world consequences of various regulatory approaches, without thinking that any intrusion on broadcasters' choice of programming is automatically unacceptable.[231]

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[228] *Id.* at 18.

[229] *Id.* at 81–88.

[230] *Id.* at 84.

[231] SUNSTEIN, DEMOCRACY, *supra* note 8, at 81.

This approach is consistent with reform suggestions that leave existing First Amendment doctrine undisturbed or that constitute a reasonable extension or evolution of that doctrine. In light of this cautious approach with regard to concrete, practical suggestions, Sunstein's theoretical argument in favor of developing "something like a 'New Deal' for speech"[232] raises serious questions.[233] This "New Deal" is not some minor tinkering with existing First Amendment law. It is a wholesale remaking of the law. The revolutionary nature of Sunstein's restructuring of the First Amendment is evidenced by, among other factors, his enthusiastic approval of the German Constitutional Court's approach to the freedom of broadcast question.[234] Sunstein's agreement with the Constitutional Court is not based on misunderstanding. He knows that the Court has held that an unregulated broadcast system is inconsistent with the Basic Law, even if scarcity of any kind ceases to be an issue.[235] He cites approvingly the passage from the Constitutional Court's 1981 opinion holding that the states are obliged to provide legislative guarantees against the risks of a libertarian system.[236] In concluding his brief but accurate survey of German freedom of broadcast jurisprudence, Sunstein comments:

> From the German cases, then, we see an understanding of the free speech principle that overlaps a great deal with the Madisonian view. Germany of course has a relatively well-functioning democratic system, one that is especially alert to the risks of tyranny in the wake of the Nazi experience. In these circumstances, it is highly revealing to see that the German Constitutional Court has understood its own free speech guarantee to require democratic principles and to repudiate marketplace thinking.[237]

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[232] *Id.* at xix.

[233] *See id.*

[234] *Id.* at 77–79.

[235] *Id.* at 78.

[236] SUNSTEIN, DEMOCRACY, *supra* note 8, at 78–79.

[237] *Id.* at 79. Sunstein assumes that the fact that the Court's broadcast rulings were handed down "in the wake of the Nazi experience" makes them more trustworthy. Unfortunately, Sunstein's assumption is wrong. I believe that the Court's broadcast rulings reflect a peculiar and unproductive reaction to Nazism. Like many Germans, the judges seem to have a pathological fear of faction and polarization, a deep distrust of the people. The German government's recent efforts to stem the growth of Scientology are striking evidence of this fear. Judicial rulings based on such a misunderstanding of history should not serve as models for remaking the First Amendment.

Sunstein formulates a theory of ultimate First Amendment values that is deeply informed by the thinking of Alexander Meiklejohn.[238] Sunstein retains Meiklejohn's basic structure of granting full First Amendment protection to those speech activities that "are utilized for the governing of the nation,"[239] while giving all others less protection.[240] Sunstein's Madisonian system:

> must have two minimal features. First, *it must reflect broad and deep attention to public issues.* . . . The second requirement is that *there must be public exposure to an appropriate diversity of view.*[241]

Thus, Sunstein focuses on a "system" characterized by mandatory features, by values that must be realized with the aid of the state in order for the entire free speech structure to conform to the demands of the First Amendment.[242] Reading the Free Speech clause as mandating the realization of concrete positive values is, of course, exactly the strategy of the German Constitutional Court. Under the Constitutional Court's conception of freedom of expression, state action is constitutionally required.[243]

Sunstein evaluates the American system of free expression according to his two central Madisonian criteria, attention to public issues and viewpoint diversity, focusing his attention particularly on the mass media. He finds that "[o]n both key counts, the record of the current American system is at best quite mixed."[244] Given that his criteria are expressions of ideals, a "quite mixed"-result is not necessarily an unfavorable evaluation. After all, the mass media—or, as Sunstein refers to it, the "free speech market"[245]—functions in the real world, and in one of the most complex, diverse and contradiction-ridden parts of it. Any assessment of this "system of free expression by examining whether it generates broad and deep attention to public issues, and whether it brings about public exposure to an appropriate diversity of view,"[246]

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[238] *See, e.g.*, SUNSTEIN, DEMOCRACY, *supra* note 8, at 122.

[239] Alexander Meiklejohn, *The First Amendment Is An Absolute, in* SUPREME COURT REVIEW 245, 256 (Philip B. Kurland ed., 1961).

[240] Sunstein lays out the resulting "two-tiered" system in great detail. SUNSTEIN, DEMOCRACY, *supra* note 8, at 121–65.

[241] *Id.* at 20–21.

[242] *See, e.g., id.* at xix.

[243] *See, e.g.*, 57 BVerfGE at 320.

[244] SUNSTEIN, DEMOCRACY, *supra* note 8, at 22.

[245] *Id.* at 23.

[246] *Id.* at 22.

should, however, take a broad and generous view of the realities it finds in order to be accurate and useful.[247] Given the size and diversity of this nation, the analyst must be careful not to allow his own preferences to cloud the objectivity of his evaluation. Thus, it would seem that we are not in such bad shape after all. Remedial measures, not revolutions, are called for.

Sunstein succumbs, however, to the inexorable inner logic of his First Amendment analysis which is rooted in a quest for values. Sunstein develops a theory[248] that destroys the First Amendment as we know it. This theory is a response to problems that, given Sunstein's own exposition of them, are simply not grievous enough to justify scrapping the "Worthy Tradition."[249] Sunstein's complaints about the system boil down to a rather conventional and familiar list of issues often heard in connection with television: the excessive amounts of gossip about movie stars and athletes, the lack of substance, the commodification of politics, the promotion of a bland and conventional morality, the lack of real criticism, and a dearth of dissenting views from the left or right.[250] From this justifiable, if conventional, laundry list of media faults, Sunstein draws his conclusion: "If anything like this is true, the current system of free expression is nothing to celebrate.

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[247] Thomas G. Krattenmaker and L.A. Powe emphasize the importance of taking a long-term perspective in assessing the validity of the empirical assumptions underlying the traditional First Amendment:

> [O]ur society share[s] [the] belief in the following three empirical assumptions. First, governmental control over editorial policies typically will be exercised in a discriminatory fashion, privileging that which is in vogue, mainstream, and safe while handicapping that which is not. Second, recipients—readers, listeners, viewers—are capable of judging the quality of a speaker's presentation and abandoning those speakers who do not measure up to the recipients' standards. Third, speakers compete within and across media for potential recipients, so that the public is constantly presented with a variety of viewpoints from which to choose. Further, it is only because we believe that markets for ideas and values operate in this fashion that we have chosen to place constitutional constraints on government's authority to regulate speech. We do not blush to admit that we believe these empirical assumptions to be true. Especially if we add "for the most part and in the long run," which are the conditions that really matter.

Thomas G. Krattenmaker & L.A. Powe, *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1732 (1995).

[248] *See generally* SUNSTEIN, DEMOCRACY, *supra* note 8. This radical theorization contrasts strangely with Sunstein's practical and more concrete legal reform suggestions, which are not only reasonable and helpful, but also respectful of existing First Amendment doctrine. *See id.* at 81–88.

[249] *See* KALVEN, *supra* note 1.

[250] *See* SUNSTEIN, DEMOCRACY, *supra* note 8, at 23.

And if anything like this is true, it is, I believe, the law—not nature, not freedom, and not 'private decisions'—that is responsible."[251]

The leap from the diagnosis of the weaknesses in a diverse set of speech practices to a conclusion that the whole system is unworthy is unjustified. Given the way Sunstein sets up his test of the broadcast system, the system is in a no-win situation. Notwithstanding his claims to the contrary, Sunstein argues in a utopian fashion.[252] Sunstein uses the existence of a discrepancy between his ideal and the real world to justify condemning the latter and calling for a total revamping of existing First Amendment law. He writes:

> [O]ur current system of free expression does not serve the Madisonian ideal. Free markets in expression are incompletely adapted to the American conception of sovereignty and to the commitment to government by discussion. *If we are to promote our founding ideals, we need to rethink our free speech principles.*[253]

Accordingly, Sunstein takes a revolutionary step and argues that the state should have an active role in bringing about the Madisonian values, a role that, under his theory, is not just permitted but mandated by the First Amendment. Specifically, Sunstein states:

> My approach would produce significant changes in our understanding of the free speech guarantee. It would call for a large-scale revision in the view about when a law "abridges" the freedom of speech. At a minimum, it would mean that many imaginable democratic interferences with the auton-

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[251] *Id.*

[252] *See id.* at 22. "Of course, our expectations for a system of free expression should be realistic, not utopian." *Id.*

[253] *Id.* at 119 (emphasis added). F.A. Hayek discusses this error in a different context:

> True, if we want at any time to make sure that we achieve as quickly as we can all that is definitely known to be possible, the deliberate organization of all the resources to be devoted to that end is the best way. In the field of social security, to rely on the gradual evolution of suitable institutions would undoubtedly mean that some individual needs which a centralized organization would at once care for might for some time get inadequate attention. *To the impatient reformer, who will be satisfied with nothing short of the immediate abolition of all avoidable evils, the creation of a single apparatus with full powers to do what can be done now appears as the only appropriate method.* In the long run, however, the price we have to pay for this, even in terms of the achievement in a particular field, may be very high.

FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 287–88 (1960) (emphasis added).

> omy of broadcasters or newspapers are not "abridgments" at all. *On the contrary, such autonomy, guaranteed as it is by law, may itself be an abridgment of the free speech right.*[254]

This is closely related to the Constitutional Court's theory of freedom of broadcast.[255] "Autonomy,"[256] which in this context means freedom from state interference,[257] can be an abridgment of the First Amendment only if the First Amendment imposes a duty on the state to act in pursuit of First Amendment values. As long as the First Amendment merely instructs the state to refrain from action, state inaction and the broadcast speaker's resulting autonomy do not implicate the First Amendment. But under any freedom-as-service conception of free speech, be it the German or the Sunsteinian one, state inaction may by itself be unconstitutional.

While Sunstein rejects the free speech market and adopts the value-activist First Amendment, he acknowledges the advantages that a market system has over centralized speech control.[258] Given these advantages, it simply cannot be correct that a laissez-faire system contributes nothing at all to free speech values. Any free speech structure must be—by virtue of its having to function in the real world—"incompletely adapted" to whatever free speech ideals we can formulate. This is true of a state-regulated system as well as of a market-based system. In the real world, perfection is unattainable, its lack therefore unremarkable. But Sunstein's uncompromising absolutism when it comes to justifying his new theory overrides the sensitivity to empirical considerations he otherwise shows throughout his book when he engages in concrete reform rather than in theoretical rethinking.[259]

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[254] SUNSTEIN, DEMOCRACY, *supra* note 8, at xix.

[255] *See, e.g.*, 57 BVerfGE at 320.

[256] SUNSTEIN, DEMOCRACY, *supra* note 8, at xix.

[257] *Id.*; *see also* 57 BVerfGE at 320.

[258] *See, e.g.*, SUNSTEIN, DEMOCRACY, *supra* note 8, at 18. "On every important count, a market system of this kind is much better than a system of centralized government control of speech." *Id.*

[259] Concerning the significance of Madisonianism in Sunstein's First Amendment theory, Burt Newborne observed: "As with most academic grand theory, Professor Sunstein needs a prime value to run his machine. He chooses political equality." Burt Newborne, *Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech*, 62 U. CHI. L. REV. 423, 441 (1995). In a new book, Sunstein endorses a more value-pluralistic outlook:

> Human morality recognizes irreducibly diverse goods, which cannot be subsumed under a single "master" value. The same is true for the moral values reflected in the law. Any simple, general, and monistic or single-valued theory of a large area of the law—free speech, contracts, property—is likely to be too crude to fit with our best understandings

Sunstein's theoretical radicalism contrasts strangely with his concern with preserving the appearances of the traditional First Amendment structure.[260] By reinterpreting certain familiar First Amendment con-

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> of the multiple values that are at stake in that area. It would be absurd to try to organize legal judgments through a single conception of value. What can be said about law as a whole can be said about many particular areas of law. Monistic theories of free speech or property rights, for example, will fail to accommodate the range of values that speech and property implicate. Free speech promotes not simply democracy, but personal autonomy, economic progress, self-development, and other goals as well. Property rights are important not only for economic prosperity, but for democracy and autonomy too. We are unlikely to be able to appreciate the diverse values at stake, and to describe them with the specificity they deserve, unless we investigate the details of particular disputes.

SUNSTEIN, LEGAL REASONING, *supra* note 200, at 43. This rejection of "monistic theories" is based on the book's central concept: the "incompletely theorized agreement." Sunstein describes the concept as follows:

> Incompletely theorized agreements play a pervasive role in law and society. It is quite rare for a person or group completely to theorize any subject, that is, to accept both a general theory and a series of steps connecting that theory to concrete conclusions. Thus we often have in law an *incompletely theorized agreement on a general principle*—incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases.

Id. at 35 (emphasis in original). Sunstein's embracing of pluralist First Amendment values in the context of developing an account of "incompletely theorized agreements" conflicts with his absolutist commitment to Madisonianism. *See also infra* notes 333 and 361.

[260] Sunstein's book is paradoxical in this regard. A sizable portion of the book is comprised of an illuminating discussion of strategies available under the traditional First Amendment for furthering desirable ends such as reforming campaign finance and enhancing the quality of political debate on television. These strategies, which can be used without resorting to the "New Deal for speech," seriously weaken Sunstein's proclaimed need for the "New Deal." J.M. Balkin has commented on this curious feature of Sunstein's work:

> What is most interesting about Sunstein's reforms, in fact, is not so much their specific content as the striking contrast between their relative modesty and the strong distrust of consumer choice and viewer preferences expressed in this book. Sunstein's theoretical bark is much worse than his practical bite. One reason for this discrepancy is that Sunstein is not only a gifted theoretician but also a person of impeccably sound judgment. . . . He is therefore unwilling to carry any of the principles he espouses to their logical, if potentially absurd, conclusions. Moreover, the fact that he is unwilling to do this should be understood less as a sign of his lack of consistency than of pragmatic good sense triumphing over academic excess.

J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1978 (1995). This does not quite alleviate my unease about Sunstein's theory. As Balkin acknowledges, Sunstein's practical suggestions do not constitute a refutation or necessary limitation of his theory. The theory has a life of its own and deserves to be attacked independent of the reasonable reform suggestions with which it may be surrounded. Burt Newborne has emphasized the need to refute Sunstein's theory while taking seriously his practical criticisms of the broadcast system and his reform suggestions:

> As a thoughtful indictment of the ways our current system of free speech falls short of

cepts, particularly the state action requirement, Sunstein attempts to create the appearance that his new First Amendment is really not much different from the old one.[261] Sunstein strongly affirms the traditional limitation of the First Amendment to government action only, and proclaims his commitment to this traditional constitutional category.[262] This might seem paradoxical since broadcasters and newspapers are not government entities and hence are not subject to the regulations that Sunstein desires. Sunstein avoids the clash of the state action doctrine with his newly proclaimed Madisonian First Amendment by defining out of existence the notion of private, state-free action.[263] In this manner, everything of relevance in the mass media context is converted into government action. Sunstein first states:

> I do not argue that private acts are governed by the Constitution. In fact, we should enthusiastically agree that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional questions. The constitutional text aims at "Congress," not at the owners of newspapers and radio stations. A central principle of American constitutionalism is that the most serious risks to liberty come from government, which has a monopoly on the legal use of force. This principle is far from uncontroversial; private power can be an obstacle to liberty, including liberty of expression. But freedom is often promoted if we allow the private sector to operate without constitutional constraint. In any case, there can be no violation of the First Amendment unless some government action has "abridged the freedom of speech." That action must usually take the form of a law or regulation.[264]

Sunstein then asserts that "governmental rules lie behind and create rights of property, contract, and tort. This is true especially insofar as legal rules grant people rights of exclusive ownership and use of prop-

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an ideal one, Sunstein's book is a welcome reminder of the need for reform, especially in areas where speech and money combine to create an unhealthy sludge of information and power. But as a blueprint for radical change in First Amendment theory, I find Professor Sunstein's thesis unworkable, unnecessary, and dangerous.

Newborne, *supra* note 259, at 432–33.

[261] SUNSTEIN, DEMOCRACY, *supra* note 8, at 36.

[262] *Id.*

[263] *See id.* at 109–10.

[264] *Id.* at 36.

erty."[265] Since, "[t]o find a constitutional question, we always need to find some genuine exercise of public power,"[266] the question becomes: what constitutes an exercise of public power?

Sunstein views a private entity's enjoyment of the protection of the general laws of property and contract as governmental action in the same way that the bestowal of a "license" or other specific privilege upon an individual private actor qualifies as government action.[267] According to Sunstein, the presence of "governmentally conferred" rights in both cases makes it impossible to distinguish between the two situations on the basis of government's playing a greater or lesser role. Sunstein argues:

> Newspapers are given explicit, exclusive property rights by government, and it is these exclusive rights that enable newspapers to exclude other people. The *New York Times* is able to exclude others only because of the law. Without the law of trespass, the right of exclusion would be much less effective. This is very much like the grant of a "license" to the *New York Times*. The grant of "licenses" of this kind may be conspicuous only in the broadcasting context, but that is just because property law tends to be invisible as law. There is no respect in which the exclusive rights of broadcasters are more "governmentally conferred" than the exclusive rights of newspapers. Government confers the relevant rights in both cases. I reiterate that this does not mean that property rights are bad or that we should restrict them. But it does mean that any distinction between broadcasters and newspapers cannot be justified on the ground that broadcasters are the recipient of government licenses. Both broadcasters and newspapers have been allocated some rights, but not others, by government. Nothing in the original allocation of rights justifies a greater role for government over broadcasters or a lesser role for government over newspapers.[268]

This argument gains its full power when combined with the pursuit of Madisonian free speech values. According to Sunstein, the decision

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[265] *Id.*

[266] SUNSTEIN, DEMOCRACY, *supra* note 8, at 37.

[267] *Id.* at 109–10.

[268] *Id.* The issue, however, is not *conspicuousness v. invisibility* (ideological categories); rather, it is *specificity v. generality* (logical categories).

of whether a certain act qualifies as state action must be informed by the desire to further those values.[269] The state action requirement, which he praises as a cornerstone criterion for determining constitutional relevance, has thus little independent meaning. It is primarily a tool in the service of Madisonianism:

> What I want to suggest here is, first and foremost, that legal rules designed to promote freedom of speech should not be invalidated if their purposes and effects are constitutionally valid, even if they conspicuously intrude on the rights of some property owners and even some speakers. *The issue of constitutional validity should be assessed in Madisonian terms:* Do the rules promote greater attention to public issues? Do they ensure greater diversity of view? If these are the relevant questions, a governmental requirement of free air time for candidates would be constitutional. We may also conclude that some legal rules of property ownership do violate the First Amendment, and in some surprising places, if and when such rules are invoked by property owners to "abridge the freedom of speech" by preventing people from speaking at certain times and places.[270]

Sunstein's Madisonian conception of free speech thus calls for regulation in service of the First Amendment's core values. Madisonian values and the First Amendment have become co-extensive. The state action requirement, traditionally limiting the range of situations where the First Amendment can be invoked, has been turned on its head justifying far-reaching state regulation in service of the First Amendment.[271]

Sunstein's position is, in essence, that the New Deal has taught us that there is no state of nature in our society. Rather, everything is structured by laws (which often operate invisibly and imperceptibly).[272]

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[269] *Id.* at 37–38.

[270] *Id.* (emphasis added).

[271] "Under Sunstein's theory, every piece of printed matter produced in this country depends at bottom on the availability of invoking the mechanisms of government to prevent private interference with its production. Every speech, every political protest, and every rally also depends on the threat that interference with those activities will be punished under the law. Every telephone conversation, fax, and e-mail that addresses political issues owes its existence in some sense to the establishment of phone lines through public rights-of-way. In all of these cases, '[g]overnment confers the relevant rights,'[] opening the way to regulation of even outright political speech." Ronald W. Adelman, *The First Amendment and the Metaphor Of Free Trade*, 38 ARIZ. L. REV. 1125, 1137 (1996) (footnote omitted).

[272] SUNSTEIN, DEMOCRACY, *supra* note 8, at 36–37.

The private realm is, in fact, the result of specific governmental power and rights allocations.

Even if one accepts this premise, Sunstein's conclusion does not follow. Sunstein discards crucial distinctions. The law of trespass, under which a newspaper has control over its physical premises, is labeled "allocation of rights."[273] A broadcast license is labeled "allocation of rights."[274] But these allocations of rights do not operate at the same level of specificity. Nominal identity does not justify identical treatment. If we want to retain the state action requirement as a meaningful concept of American constitutional law, it is incoherent to annihilate the requirement by universalizing it. Is there any aspect of human life that would escape the "state action" label as Sunstein understands it? It would have to be an aspect that is totally unaffected by any "allocation of rights." Such an aspect may be impossible to find. The expansiveness of Sunstein's state action theory causes the theory to self-destruct.

C. *Owen Fiss and the State as Friend*

Professor Fiss has developed a theory of free speech that makes government regulation an integral part of the First Amendment.[275] Fiss argues for a reinterpretation of our core understanding of the First Amendment, away from a legal regime that only constrains state action and interference and toward a new system in which the state acts openly as guarantor of the central free speech values.[276] This is accomplished by actively intervening in the realm of speech and in the exchange of ideas, amplifying the speech of some, subduing that of others, making sure all relevant voices get heard in proper proportionality. Sound familiar? Fiss has reinvented the freedom of broadcast jurisprudence of the German Constitutional Court.[277] However, his "state as guarantor" conception of the constitutional free speech right is even broader than that of the Constitutional Court. There is no

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[273] *Id.* at 110.

[274] *Id.*

[275] FISS, IRONY, *supra* note 1.

[276] *See, e.g., id.* at 3–4.

[277] *See id.* at 83; 57 BVerfGE at 320. Fiss writes: "The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights." FISS, IRONY, *supra* note 1, at 83. The German Constitutional Court writes: "The freedom of broadcast is primarily a freedom . . . in service of the freedom of opinion formation." 57 BVerfGE at 320.

unregulated press existing alongside a regulated broadcast in Fiss's new constitutional order.[278] The Fissian reconceptualization of the First Amendment as a serving freedom would extend to any and all speech issues.[279]

Fiss's reconstruction of the right to free speech as a call for the state to act is not any more successful than Sunstein's or that of the German Constitutional Court.[280] If anything, Fiss's clarity, his intellectual honesty, and the thoroughness with which he pursues his task highlight the shortcomings and problems of the service conception of free speech that I have previously diagnosed.

Immediately, Fiss puts his cards on the table. "We are being invited, indeed required, to re-examine the nature of the modern state and to see whether it has any role in preserving our most basic freedoms. . . . I will try to explain why the traditional presumption against the State (as the natural enemy of freedom) is misleading and how the state might become the friend, rather than the enemy, of freedom."[281] Fiss then states that his view is fundamentally predicated "on a theory of the First Amendment and its guarantee of free speech that emphasizes social, rather than individualistic, values. The freedom the state may be called upon to foster is a public freedom."[282] As in the case of the German freedom of broadcast, the shift from state as enemy to state as friend is to be accomplished by emphasizing certain values underlying the right to free speech. Immediately, a discussion of values takes center stage.

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[278] *See, e.g.*, 12 BVerfGE at 260–62.

[279] Fiss's work seems to have an initial advantage over the German development of the identical doctrine. He has the opportunity to develop afresh a doctrine that the Constitutional Court had to create in the context of ruling on legal controversies, with their attendant constraints, complications, and compromises. In addition, the German approach to broadcast regulation was, as I have argued above, born originally out of historical contingency, namely the existence of only one television channel, that was only subsequently transformed into the service idea of the freedom of broadcast. Thus, one might think that the many blind spots in the German rationale underlying the service conception of freedom of broadcast are partly the consequence of the Court's instinctive acceptance of existing legal and regulatory structures rather than weaknesses inherent in the theory itself. Fiss, on the other hand, must accept far fewer founding realities for his theory than could the Constitutional Court. He can develop it from scratch. His fresh start does not, however, lead to a better, more convincing result than the efforts of the Constitutional Court, thus confirming this article's thesis that the weaknesses of the value approach to free speech are inherent and irremediable.

[280] *See supra* Parts II and III(B).

[281] FISS, IRONY, *supra* note 1, at 2.

[282] *Id.*

The value Fiss favors is "protection of popular sovereignty,"[283] that is, the broadening of "the terms of public discussion as a way of enabling common citizens to become aware of the issues before them and of the arguments on all sides and thus to pursue their ends fully and freely. A distinction is thus drawn between a libertarian and a democratic theory of speech, and it is the latter that impels my inquiry into the ways that the state may enhance our freedom."[284] The libertarian theory of the First Amendment emphasizing speaker autonomy collapses, according to Fiss's analysis, into the collectivist rationale: "The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights."[285] It is the core value of public sovereignty and collective self-determination that is driving Fiss's theoretical machinery.[286] However, none of this has yet altered existing First Amendment doctrine or has even begun to point to a reason why the First Amendment should embrace, rather than reject, the state. As Fiss points out correctly, many First Amendment thinkers have believed that the value of collective self-determination is central in any free speech order.[287] How does Fiss use this proposition not only to call upon the state to act in furtherance of the First Amendment, but in fact to require the state to do so under the (new) First Amendment itself?

The transition from a First Amendment of minimal to one of maximal state involvement is achieved on a level of high theory and abstraction. Concrete and obvious problems created *by* the new order are discussed, if at all, only as issues deserving of a certain amount of attention *under* the new order—but not as considerations that might counsel against establishing the new order in the first place. Despite the lucidity and honesty of Fiss's exposition and his deliberate efforts not to avoid tough questions, the most important questions surrounding Fiss's commitment to a First Amendment as a serving freedom in the German style are never given adequate consideration.

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[283] *Id.*

[284] *Id.* at 3. Again, Fiss's theory is closely related to that of the German Constitutional Court. *See, e.g., supra* note 35 and accompanying text, *quoting* 57 BVerfGE at 319–20.

[285] *Id.* at 83.

[286] *See* FISS, IRONY, *supra* note 1, at 1–4.

[287] *Id.* at 2.

Fiss summarizes the First Amendment jurisprudence of the Supreme Court in the following way:

> The precise location of [the narrow boundary around the state's regulatory authority] has varied from age to age and from Court to Court, and even from Justice to Justice, but its position has always reflected a balance of two conflicting interests—the value of free expression versus the interests advanced by the state to support regulation (the so-called countervalues). Sometimes the accommodation of conflicting interests has been achieved through the promulgation of a number of categories of speech that may be subject to regulation. For example, the state has been allowed to regulate "fighting words" but not the "general advocacy of ideas." In other cases, the Court engaged in a more open and explicit balancing process in weighing the state's interest against that of free speech. The rule that allows the state to suppress speech that poses a "clear and present danger" to a vital state interest might be the best example of this approach. In either instance, the Court has tried, sometimes more successfully than others, to attend to both value and countervalue and to seek an accommodation of the two.[288]

Fiss's analysis shows that the concepts of "value" and "balancing" are key ingredients in his constitutional system centered on state activism. The framing of the central issue in terms of value does the work for Fiss here. By invoking a balance of fundamental values as the foundation of the existing First Amendment, Fiss creates a strategically useful premise that conceptually facilitates his rewriting of the entire First Amendment in terms of value trade-offs.

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[288] *Id.* at 5. Conceiving of the "Worthy Tradition" as fundamentally a balancing act of competing values destroys the considerable doctrinal stability and solidity of that tradition. Such a conception ignores the complicated set of rules and doctrines that constitute the concrete First Amendment today. These rules and doctrines act to eliminate as far as possible the balancing of values. Instead, they provide categories that judges can apply without reference to underlying principles and justifications. In fact, the entire structure of the current First Amendment is one fundamentally informed by a categorizing, rather than a balancing, approach. The exalted status of free speech in the American legal system is a result of categorically elevating the idea of freedom from state interference in speech matters above almost all conceivable countervalues, thus obliterating the kinds of tradeoffs between competing constitutional values that are so characteristic of German constitutional theory and practice. *See, e.g.*, 30 BVerfGE 173 (1971) and discussion *supra* notes 46–59 and accompanying text.

Fiss analyzes the countervalues of the 1960s that were brought forth in opposition to the First Amendment, correctly finding them lacking in merit. "The Supreme Court listened to that defense [Southern states attempting to preserve order] with some measure of seriousness, but the plea on behalf of maintaining order was impeached by the racial policies the states were pursuing in the name of that value."[289] In short, then, the Warren Court's free speech cases "were not a true test of Kalven's faith that free speech would prevail"[290] because the countervalues were so weak and the balancing therefore so easy. In sharp contrast, the contemporary countervalues arising out of the debates on hate speech, pornography, and campaign finance "have an unusually compelling quality."[291] Consequently, "in confronting the regulation of hate speech, pornography, and campaign finance today, many liberals find it difficult to choose freedom of speech over the countervalues being threatened."[292] Fiss asserts that these powerful modern countervalues embody equality interests, in contrast to the liberty interests of the First Amendment.[293] The problem therefore is how to resolve the "conflict between liberty and equality,"[294] that is, how to resolve the emerging conflict between the First Amendment and the Fourteenth. Given that the Fourteenth Amendment values that come into play here have become "architectonic"[295] in modern constitutional law and that therefore the "firstness of the First Amendment appears to be little more than an assertion or slogan,"[296] there is, according to Fiss, "no principled way of resolving the conflict between liberty and equality."[297]

Fiss's statement of the problem implies his preferred solution. Everything has become a conflict of values. The underlying values of the First Amendment conflict with the underlying values of the Fourteenth Amendment. Since both the values and the countervalues are "architectonic" in the American constitutional order, there is no higher or ultimate principle that we could use as a criterion in guiding our decision whether liberty or equality should be given preference.[298] In

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[289] FISS, IRONY, *supra* note 1, at 7.

[290] *Id.* at 8.

[291] *Id.* at 9.

[292] *Id.* at 10.

[293] *Id.*

[294] FISS, IRONY, *supra* note 1, at 12.

[295] *Id.* at 11.

[296] *Id.* at 12.

[297] *Id.* at 15.

[298] By now it has become doubtful which is which, or whether the value-countervalue distinction makes any sense at all.

the Fissian hierarchy of constitutional values, we have reached an impasse since two master values, both of the highest rank, have come into conflict.

Having set up the problem in terms of competing ultimate values, Fiss proposes an elegant solution that synthesizes and harmonizes the clashing value systems.[299] Fiss eliminates the countervalues by integrating them into the value system with which they originally seemed to conflict.[300] The central contemporaneous countervalue, equality, is particularly relevant with respect to traditional First Amendment problems, such as hate speech, pornography, and campaign finance.[301] The fact that the "architectonic" notion of equality[302] persistently arises in the midst of First Amendment discussions allows Fiss to reconceptualize equality as a First Amendment, rather than purely a Fourteenth Amendment, interest. Fiss reasons:

> We may have to live with this sorry state of affairs; but there may be another way of framing the issue that moves beyond this battle between transcendent values. Perhaps the regulations in question can be seen as themselves furthering, rather than limiting, freedom of speech. This understanding of what the state is seeking to accomplish would transform what at first seemed to be a conflict between liberty and equality into a conflict between liberty and liberty. This formulation would not make all disagreements go away, nor would it obviate the need for hard choices, but it would place those choices within a common matrix. It would make the controversy over regulation less a battle over ultimate values, a fruitless inquiry into whether the Fourteenth or the First Amendment comes first, and more a disagreement among strong-minded people working to achieve a common purpose: free speech.[303]

Free speech values are now on both sides of the equation. This obviates the need for decisions among ultimate values. According to Fiss, such decisions cannot be made in a principled way.[304] Thus, all that is left

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[299] *See generally* FISS, IRONY, *supra* note 1, at 15.

[300] *Id.*

[301] *Id.* at 10.

[302] *Id.* at 11.

[303] *Id.* at 15. Fiss's reasoning is highly reminiscent of the Constitutional Court's approach, set forth in 7 BVerfGE 198 (1958) (Lüth) and exemplified in 30 BVerfGE 173 (1971) (Mephisto), whose central concern is exactly to place tough choices among constitutional rights "within a common matrix." *Id.*; *see generally supra* Part II(A).

[304] *See* FISS, IRONY, *supra* note 1, at 15.

to decide is what is best for free speech. Somebody, however, must make this decision. That somebody is the state.

Fiss's argument transforms the First Amendment into a set of obligations on the state affirmatively to pursue and bring about robust public debate. Fiss states:

> The First Amendment is generally viewed as the most libertarian of all constitutional provisions, the constitutional breeding ground for state minimalism. So if we can see that the NEA and other speech-subsidy programs are consistent with, indeed favored by, the First Amendment, then the constitutional foundation for rejecting the classic liberal ideal of the minimal state and *embracing state activism in meeting all manner of needs will have been placed on the most secure footing.*[305]

The First Amendment as rewritten by Fiss might read something like this: *The state is the guarantor of robust public debate and shall act to whatever extent necessary to make robust public debate a reality in the United States.* Fiss reasons:

> [T]he First Amendment should be more embracing of [regulation trying to preserve the fullness of debate], since that regulation seeks to further the democratic values that underlie the First Amendment itself.[306]

Under traditional free speech doctrine, the presumptions in favor of the speech interest, understood to mean freedom from state interference, are paramount. The real difficulty with that doctrine lies, for Fiss, not in the "unprincipled" way in which disputes between strong values are resolved;[307] rather, it lies in the fact that this type of First Amendment regime will only occasionally, and only grudgingly, accept the state as "friend," and even then only as friend of some other value, rather than as friend of speech values.[308] Once First Amendment values are on both sides of the equation, however, any presumption against state interference is eliminated. Under Fiss's preferred rule, the question is not whether the equality interest on the other side of the lawsuit is strong enough to overcome the First Amendment presumption against state regulation of speech.[309] Rather, since the interests on

[305] *Id.* at 49 (emphasis added).

[306] *Id.* at 19.

[307] *Id.* at 15.

[308] *Id.* at 5.

[309] FISS, IRONY, *supra* note 1, at 15.

both sides are now First Amendment interests, a court faces the productive task of furthering these interests, rather than the "fruitless inquiry" into which competing value comes first.[310] This is the essence of the transformation of the First Amendment advocated by Fiss.

If American courts adopt Fiss's First Amendment theory, the state will become the guarantor of the First Amendment, the prime activist in the United States in pursuit of the central free speech ideal—collective self-determination through robust public debate. The state will now act as a "fair parliamentarian"[311] by substantively interfering in actual speech practices, telling certain speakers that are disfavored under the public debate rationale to keep quiet for a while[312] and giving other, weaker speakers megaphones so they can be heard in the public debate.[313] In short, state regulation becomes the core rule under Fiss's First Amendment.

Motivating Fiss's remaking of the First Amendment is his belief that "[o]ver the past twenty-five years a new Court has come into being, and with it a new First Amendment jurisprudence."[314] Fiss argues that the prominent First Amendment decisions of these years, *Miami Herald, Pacific Gas & Electric, Buckley v. Valeo, R.A.V. v. St. Paul,* and *Rust v. Sullivan,*[315] "represent a turn away from a democratic theory of the First Amendment and a move toward a more libertarian one. Common to all these decisions is a marked hostility toward the state and a refusal to acknowledge the role the state can play in furthering freedom of speech."[316] Concretely, Fiss fears that these decisions, and particularly *Rust v. Sullivan* and *Pacific Gas & Electric,* could do immeasurable damage to the state in its role as allocator of resources through, for example, the NEA, and therefore as active contributor to the quality and richness of public debate in the United States.[317] According to Fiss, *Pacific Gas & Electric* "affirm[ed] the right of citizens not to have their property used by the government to support an activity they detest."[318]

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[310] *Id.*

[311] *Id.* at 22.

[312] *Id.* at 21–22.

[313] *Id.* at 4.

[314] FISS, IRONY, *supra* note 1, at 79.

[315] *See, e.g.,* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Buckley v. Valeo, 424 U.S. 1 (1976); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Rust v. Sullivan, 500 U.S. 173 (1991).

[316] FISS, IRONY, *supra* note 1, at 79.

[317] *See id.* at 76–78.

[318] *Id.* at 77.

Under the logic of that decision, allocative state programs such as the NEA and the Corporation for Public Broadcasting might be rendered unconstitutional.[319] The consequences of such a ruling would be dire: "In that instance, the allocative state will, as a matter of constitutional law, have been brought under the same regime that now governs the regulatory one; free press will have become reduced to free enterprise, and the fate of our democracy will be placed wholly in the hands of the market."[320]

For Fiss, that would be an extremely undesirable outcome. Others, of course, would celebrate this development as the final step of First Amendment law working itself pure.[321] Let us assume for purposes of productively addressing Fiss's arguments, however, that we want to prevent such an expansive reading of *Pacific Gas & Electric*, that we do not agree with Justice Scalia's aggressive application of the principle of content neutrality in *R.A.V. v. St. Paul* or with what Fiss calls Justice Rehnquist's indifference "to the effects allocative decisions might have upon the robustness of public debate."[322] Let us agree, in short, that we wish to avoid a purely libertarian First Amendment. What should we do to prevent such an outcome? Fiss's answer is clear. The traditional First Amendment that minimizes state involvement in speech matters must be abolished and replaced by a regime in which the state acts to whatever extent necessary to bring about robust public debate.[323] This response is untenable. Fiss has simply failed to demonstrate that furthering public debate in American society requires the radical steps that he has outlined, or that the costs and risks associated with such steps are compensated for by the gains under a Fissian system.

Sometimes reality shines through cracks that appear even in the carefully chiseled surface of Fiss's argument. I do not mean the acknowledgment "that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well."[324] Rather, what I am

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[319] *See id.* at 77–78.

[320] *See id.* at 78.

[321] *See, e.g.*, John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 56 (1996).

[322] FISS, IRONY, *supra* note 1, at 46.

[323] *See, e.g., id.* at 49.

[324] *Id.* at 83. Statements such as this one are not much more than window dressing. After all, if the state can be so dangerous, if the truth about the state's role is indeed so "complicated," then why craft a theory that, by its own logic, wholeheartedly and unreservedly embraces the

addressing here are the moments where the true complications and impracticalities of his proposed new regime make themselves felt. For example, Fiss realizes that "[s]ly politicians may say that they are regulating content in order to enrich public debate and to make certain that the public hears from all sides, but their purpose may, in fact, be to determine outcome or further certain policies."[325] That, indeed, is one of the great risks of a system in which the state meddles with the opinions of and the debates among its citizens. Even if we all agreed with Fiss that the state would be a wonderful quality-enhancer of public debate, we would still have to refrain from using the state for that purpose as long as we concluded that the risks of abuse were too great. Fiss's answer to the problem that he has raised, however, is unlikely to ease anyone's concerns about such abuses. He proposes designing the institutions that regulate speech content to ensure a balanced debate in such a way as to "remove[] them from the political fray."[326] There is not a hint as to how that is to be accomplished. As Fiss states correctly, politicians often tend to be "sly."[327] One should expect any agency entrusted with regulating speech to be subject to immense political pressures. In all likelihood, the non-political status of such an agency would be subverted by "sly" politicians in short order. Fiss's naive reliance on such an institution is thus not an acceptable solution.[328]

In order to overcome this obvious problem, Fiss turns to the courts.[329] He invokes judicial supervision of the governmental bureaucracy that would implement the new First Amendment, while acknowledging that this would be a "heavy burden" on the courts.[330] Fiss proposes the following criterion to guide the courts: "Will the regula-

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state, a theory that empties the First Amendment of any principled means of keeping the state out of speech affairs? *See id.* Fiss's theory knows nothing about the dangers of state interference in speech matters.

[325] *Id.* at 24.

[326] *Id.*

[327] FISS, IRONY, *supra* note 1, at 24.

[328] Fiss's invocation of a non-political speech agency demonstrates the fundamental shortcoming of his value approach. That shortcoming consists of the necessity to have an ultimate authority decide what the relevant values are and how they are to be interpreted and applied. In short, as Fiss's appeal to such an authority makes clear, the value approach depends on rule by "a bevy of Platonic Guardians." LEARNED HAND, THE BILL OF RIGHTS 70 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic guardians, even if I knew how to choose them, which I assuredly do not.").

[329] *See* FISS, IRONY, *supra* note 1, at 24.

[330] *Id.*

tion actually enhance the quality of debate, or will it have the opposite effect?"[331]

It is hard to imagine a less helpful test. The burden on judges would indeed be "heavy."[332] How is a judge supposed to know whether a certain regulation will enhance the quality of debate? Apart from the question of what the term "quality of debate" might actually mean, this seems to be an intensely fact-specific issue with respect to any given regulation, one that does not lend itself to the creation of a sound and intelligible body of precedent. Such questions concerning the substantive quality of public debate probably cannot be decided in an acceptably objective, nonpolitical fashion.[333]

Fiss himself provides a convincing, if perhaps involuntary, demonstration of the impracticality of his proposed new First Amendment. He explains that the silencing effects of hate speech and pornography "depend on a more subtle psychological dynamic—one that disables or discredits a would-be speaker."[334] Grappling with the issue of court supervision of state-ordered correctives for such subtle dynamics, Fiss continues:

> In the specific case that comes before the court, the dynamic might not be present, or the chosen correctives might be clumsy, causing more distortions in public debate than they

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[331] *Id.*

[332] *Id.*

[333] Remember in this context the discussion, *supra* at 55–57, about the German Constitutional Court's 1991 broadcast decision and the Court's reaction to the argument that an important societal voice (the "Vertriebene") had been excluded from an editorial board that supposedly represented the breadth and diversity of that state's spectrum of opinions. *See* 83 BVerfGE at 283–85, 337–38. Note also Sunstein's recent admonition concerning the practical problems of Fiss's (and his own) First Amendment theory:

> Some philosophers think, for example, that a free speech principle that places a special premium on political discussion is extremely attractive. But judges may not be able to agree on this idea, and some degree of agreement is indispensable in light of the fact that cases have to be decided. Perhaps too a political [*sic.*] approach to the First Amendment would be too readily subject to abuse in the real world. Perhaps any judgment, within human institutions, about what counts as "the political" would be too biased and unreliable to be acceptable. For good institutional reasons, we might adopt a free speech principle of a low-level or philosophically inadequate sort simply because that approach is the only one we can safely administer. In this way there may be a significant split between a philosophically convincing account on the one hand and a legally correct approach on the other.

SUNSTEIN, LEGAL REASONING, *supra* note 200, at 82–83.

[334] FISS, IRONY, *supra* note 1, at 25.

> cure. The traditional remedy—more speech—might be far better. *It is hard to be certain about these matters, especially when operating at this level of abstraction.*[335]

This passage shows how difficult it would be for the courts to administer a Fissian First Amendment and how little guidance Fiss gives the courts in the free speech realm.[336] But the passage does more than that. It reveals the hollowness at the heart of Fiss's theory.[337] The high level of abstraction at which Fiss operates prevents him from even beginning to resolve the problems that his argument creates.[338] The central strategy that allows Fiss to develop his theory in the first place—a persistent focus on abstract values—now prevents him from addressing the theory's most profound problems. Fiss's argument falls apart as soon as it is pinned down, forced to become concrete, to give satisfactory explanations of the empirical questions it raises and to outline the specific legal regime it would engender.

There is an interesting passage in Fiss's book in which he discusses *Red Lion Broadcasting Co. v. FCC*[339] and *New York Times v. Sullivan.*[340] Fiss harmonizes these foundational First Amendment cases in the following way:

> . . . *Red Lion* was not at war with *New York Times v. Sullivan.* These decisions were in tension in operational detail: *Sullivan* kept the state at bay, while *Red Lion* embraced the state. But *Red Lion* was handed down by the same Court during the same historic period as *Sullivan* and rested on *Sullivan*'s animating principle. *Red Lion* and *Sullivan* were seen as companions, as two complementary strategies for furthering the democratic mission of the press and, as such, as part of the same system of free expression.[341]

Fiss's analysis is clear. Both cases are motivated by the same set of values. In the Fissian First Amendment world, they are therefore identical in relevant part.[342] They are in harmony because their "animating

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[335] *Id.* (emphasis added).

[336] *See id.*

[337] *See id.*

[338] It is remarkable how quickly Fiss gives up resolving this defect in his theory: the problem is no sooner recognized that it is already dropped.

[339] 395 U.S. 367 (1969).

[340] 376 U.S. 254 (1964).

[341] FISS, IRONY, *supra* note 1, at 57–58.

[342] *See id.*

principle" is the same.[343] The differences between them are merely a matter of "operational detail."[344] This is perhaps the most startling remark in the entire book, and a revealing piece of analysis. It confirms that what really matters to Fiss is underlying value. Value is the salient part of a judicial decision. When two decisions have the same value, they are in harmony: "*Red Lion* affirms the very same values proclaimed by *Sullivan*."[345] Who cares whether their rulings, their real-world effects, are diametric opposites? These real-world effects—"*Sullivan* kept the state at bay, while *Red Lion* embraced the state"[346]—are no more than "operational details."[347]

Fiss's harmonizing of *Red Lion* and *New York Times v. Sullivan* once again demonstrates the power and efficacy of the value focus. Just as the German Constitutional Court's focus on the values underlying the freedom of broadcast allowed it to avoid contemplating the realities of the broadcast regime that it was mandating,[348] and just as Sunstein's Madisonian value commitments lead him to turn the state action requirement into its contrary,[349] so can Fiss virtually disregard the concrete effects of two opposite speech rulings because he views them in harmony at the level of ultimate value pursued by both.[350] But a legal regime does not solely consist of, nor is it reducible to, the values and philosophical justifications underlying it. It functions in the real world, structuring and affecting the behavior of people and organizations. When two legal rulings conflict on that concrete level in the way that *Red Lion* and *New York Times v. Sullivan* do, no appeal to philosophical deep structures can, by itself, resolve the conflict or deflate its significance into that of "operational detail."[351]

Fiss concedes, of course, that the state can be both friend and enemy of speech when he states:

> We must learn to embrace a truth that is full of irony and contradiction: that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine

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[343] *Id.* at 58.
[344] *Id.* at 57.
[345] *Id.* at 58.
[346] FISS, IRONY, *supra* note 1, at 57.
[347] *Id.*
[348] *See supra* notes 148–50 and accompanying text.
[349] *See supra* notes 260–74 and accompanying text.
[350] *See* FISS, IRONY, *supra* note 1, at 57–58.
[351] *Id.* at 57.

> democracy but some wonderful things to enhance it as well. This, I fear, is a complicated truth, far more complicated than we have allowed ourselves to admit for some time now, but which is still—I hope—not beyond our reach.[352]

The true irony of *The Irony of Free Speech* is, however, that it does not even begin to acknowledge this "complicated truth," that Fiss's theory cannot address any of the complications it raises because its focus on value forecloses their consideration. The theory with which Fiss seeks to accommodate the multifaceted nature of his free speech truth, then, does not in fact capture the complexity that Fiss diagnoses. On the contrary, Fiss's theory proceeds as if there were no complications to be acknowledged, as if the state were a perfectly inoffensive and reliably neutral actor, to be called on freely and at will for the greater social good. Fiss's theory, by its own logic, wholeheartedly embraces the state and imposes an affirmative duty on the state to act, to legislate, to regulate, in furtherance of a First Amendment redefined according to Fissian parameters.[353] Fiss's theory annihilates the defensive dimensions of the traditional First Amendment by transforming it from a negative freedom into an obligation on the state to safeguard and realize the values of free speech. Given that the state "can do terrible things to undermine democracy,"[354] this is simplistic as well as dangerous.

D. *Justice Breyer and the Value Approach to the First Amendment*

Analyzing the Supreme Court's first decision in *Turner Broadcasting*, Fiss regrets that "[a]ll that unified the Court was a distrust of government."[355] He notes that "[u]nder these circumstances, it is hard to think of *Red Lion* and its endorsement of state power as anything other than a stray, living at the margins of the law, a formal vestige of another era, soon to be overtaken by technological advances that will shrink almost

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[352] *Id.* at 83.

[353] There is a difference between the inherent logic or dynamic of an argument and the intended boundaries that the argument's author sets around it. Fiss himself believes that the logic of a legal concept will ultimately assert itself; note, for example, his discussion of *Pacific Gas & Electric:* "In *Pacific Gas & Electric* itself, Justice Powell's opinion contained a single sentence disclaiming any intent to limit the state's power to allocate . . . . Yet I wonder whether, in time, the logic of the decision will overwhelm his disclaimer." *Id.* at 77. I believe that the inner force of the Fissian First Amendment revolution sweeps away Fiss's own cautionary statements.

[354] *Id.* at 83.

[355] FISS, IRONY, *supra* note 1, at 70; *see also Turner I*, 512 U.S. 622.

to nothing the practical significance of the domain it controls."[356] Fiss views *Turner I* as a meaningless battle between the majority and the dissenters about whether the must-carry provisions of the 1992 Cable Act were content regulation, noting that Justice Kennedy's plurality opinion argued almost desperately that they were not.[357] For Fiss, therefore, *Turner I* merely "revealed how empty a precedent *Red Lion* had finally become."[358]

Sunstein, in a 1995 article,[359] takes a much more positive view of *Turner I* than Fiss. For him, the decision represents not just an empty doctrinal battle among anti-government dogmatists. Rather, he seizes on the "Court['s] suggest[ion] that a content-neutral effort to promote diversity may well be justified," concluding that "the *Turner* opinion contains an echo, albeit a faint one, of the highly Madisonian analysis in *Red Lion*."[360] Based on these insights, Sunstein reaches the following conclusion:

> There is therefore an important paradox at the heart of the *Turner* model. The paradox emerges from (a) the presumptive invalidity of content-based restrictions, accompanied by (b) the insistence by the Court on the legitimacy of the goals of providing access to a multiplicity of sources and outlets for exchanges on issues of local concern. This is a paradox because if these goals are legitimate, content-based regulation designed to promote them might well be thought legitimate too.[361]

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[356] FISS, IRONY, *supra* note 1, at 72.

[357] *Id.* at 73–74.

[358] *Id.* at 69.

[359] Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995) [hereinafter Sunstein, *Cyberspace*]. A shortened version of this article is included as an afterword in SUNSTEIN, DEMOCRACY, *supra* note 8, at 253–75.

[360] *Id.* at 1778.

[361] *Id.* In subsequent portions of the article, Sunstein provides a highly sophisticated analysis of why *Turner I*'s insistence on content-neutrality might actually be preferable to content regulation along Madisonian lines:

> We might thus offer a cautious defense of the *Turner* model over the Madisonian model. The defense would depend on the view that the *Turner* model may well best combine the virtues of (a) judicial administrability (a real problem for Madisonians), (b) appreciation of the risk of viewpoint discrimination (a real problem for Madisonians too), and (c) an understanding of the hazards of relying on markets alone (addressed by *Turner* insofar as the Court allows Congress considerable room to maneuver). For this reason, the *Turner* model may well be better, at least in broad outline, than the Madisonian and marketplace alternatives.

Justice Breyer's concurrence in *Turner II*[362] strongly focuses on the Madisonian dimensions that Sunstein found in *Turner I* and should do much to alleviate Fiss's despondency about the marginalization of *Red Lion*. This concurrence constitutes an attempt to solve the "paradox at the heart of [*Turner I*]"[363] by resorting to an unconditional commitment to Madisonianism in the Sunsteinian sense and to a Fissian embrace of the state as the promoter of First Amendment values.[364] Justice Breyer pays absolutely no heed to Sunstein's carefully differentiated acceptance of *Turner I* which found merit in both the Madisonian and the defensive aspects of that decision,[365] and instead adopts the value approach of Fiss and Sunstein, in his incarnation as the orthodox Madisonianist, to the letter.[366]

Justice Breyer concurs in the opinion of the Court in order to emphasize his reliance on a speech value rationale, rather than on Justice Kennedy's preferred economic rationale. Justice Breyer reasoned:

> My conclusion rests, however, not upon the principal opinion's analysis of the statute's efforts to "promot[e] fair competition," . . . but rather upon its discussion of the statute's other objectives, namely "'(1) preserving the benefits of free,

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Id. at 1779. Sunstein ultimately justifies his cautious preference of the "paradoxical" approach in *Turner I* and his lack of dogmatism with respect to his Madisonian values with the following thought:

> Often participants in legal disputes, and especially in constitutional disputes, disagree sharply with respect to high-level, abstract issues; the debate between Madisonians and marketplace advocates is an obvious illustration. But sometimes such disputants can converge, or narrow their disagreements a great deal, by grappling with highly particular problems. In other words, debate over abstractions may conceal a potential for productive discussion and even agreement over particulars. Perhaps this is a strategy through which we might make much progress in the next generation of free speech law.

Id. at 1796. This thought is at the heart of LEGAL REASONING AND POLITICAL CONFLICT, *supra* note 200. What makes *The First Amendment in Cyberspace* such a fascinating piece is that it exemplifies an unresolved conflict in Sunstein's thinking. This article makes use of the value dogmatism of DEMOCRACY AND THE PROBLEM OF FREE SPEECH (see particularly an approving reference to the broadcast decisions of the German Constitutional Court, Sunstein, *Cyberspace, supra* note 359, at 1788 n.130), but it also indicates that Sunstein is willing to forego theoretical perfection for the sake of "productive discussion and even agreement over particulars." Sunstein fails, however, to forge a synthesis of these two conflicting approaches.

[362] *Turner II*, 117 S. Ct. at 1203–04.

[363] Sunstein, *supra* note 359, at 1778.

[364] *See supra* Parts III(B) and III(C).

[365] *See supra* notes 359–61 and accompanying text.

[366] *See supra* Parts III(B) and III(C). There is no need here to analyze the other opinions of

> over-the-air local broadcast television,'" and "'(2) promoting the widespread dissemination of information from a multiplicity of sources.'"[367]

The consequences of this resolute value focus are predictable. The First Amendment ends up on both sides of the lawsuit:

> I do not deny that the compulsory carriage that creates the "guarantee" [of over-the-air public access to a multiplicity of information sources] extracts a serious First Amendment price. . . . This "price" amounts to a "suppression of speech." But there are important First Amendment interests on the other side as well. The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an evershrinking non-cable-subscribing segment of the public. . . . This purpose reflects what has "long been a basic tenet of national communications policy," namely that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . That policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve. . . . With important First Amendment interests on both sides of the equation, the key question becomes one of proper fit.[368]

Devotion to Madisonian values and extension of the First Amendment—via a focus on value—to all sides of the dispute leads Justice Breyer to his central ruling in *Turner II*: "I believe that [the statute's] purpose—to assure the over-the-air public access to a multiplicity of information sources . . . —provides sufficient basis for rejecting appellant's First Amendment claim."[369]

Turner II since they by and large play out along the familiar lines set forth by the Justices in *Turner I*. The truly novel event of *Turner II* is indeed Justice Breyer's concurrence.

[367] *Turner II*, 117 S. Ct. at 1203–04.

[368] *Id.* at 1204 (citations and quotation marks omitted).

[369] *Id.* (citation and quotation marks omitted). It is true that Justice Breyer does not end his inquiry with this holding, but engages in a very brief discussion of the "bottleneck" problem that cable systems supposedly create. *Id.* at 1204–05. However, in light of Justice Breyer's unqualified reliance on the "purpose" of the statute to resolve this case, I regard his cursory attention to "bottleneck" issues as being of secondary importance.

This ruling constitutes a resounding endorsement of Sunstein's and Fiss's theories.[370] It is premised on the idea that "[t]he issue of constitutional validity should be assessed in [the functional equivalent of] Madisonian terms."[371] By accepting the "suppression of speech"[372] effected by compulsory carriage, it subscribes to the notion that the state "may . . . have to silence the voices of some in order to hear the voices of the others."[373] By allowing the statute's purpose to override the appellants' First Amendment claim, the ruling explicitly substitutes the "ends and purposes of the First Amendment"[374] for the "express provisions of the First Amendment."[375] Justice Breyer relies on the *Red Lion* decision in making this substitution.[376] In so doing, he rejects Justice Kennedy's limitation of *Red Lion* to traditional electromagnetic broadcasting and the concomitant refusal to apply *Red Lion* to cable television.[377] In other words, Justice Breyer liberates the value approach to the First Amendment from scarcity rationales that would be vulnerable to technological obsolescence, making it universally applicable. All this is rather reminiscent of the German freedom of broadcast. As we have seen, the freedom of broadcast "serves the task of guaranteeing free and comprehensive opinion formation through broadcast" and is therefore "primarily a freedom in service of the freedom of opinion formation."[378] By substituting First Amendment values for First Amendment rights and by eliminating the limiting principle of scarcity, Justice Breyer has created a faithful model of the German freedom of broadcast.

E. *The Feasibility of Partial Regulation*

Both Germany and the United States have dual constitutional rules for the mass media, allowing or commanding regulation for broadcast but prohibiting it for the press.[379] In the jurisprudence of the U.S.

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[370] *See id.*

[371] SUNSTEIN, DEMOCRACY, *supra* note 8, at 36.

[372] *Turner II*, 117 S. Ct. at 1204.

[373] FISS, IRONY, *supra* note 1, at 4.

[374] *Red Lion*, 395 U.S. at 390.

[375] *Tornillo*, 418 U.S. at 254.

[376] *Turner II*, 117 S. Ct. at 1204.

[377] In *Turner I*, Justice Kennedy reasoned: "The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium." 512 U.S. at 637.

[378] 57 BVerfGE at 320.

[379] *See supra* notes 21–30 and accompanying text.

Supreme Court, the following two holdings, both centrally important interpretations of the First Amendment, exemplify the dichotomous nature of this field of law:

> However much validity may be found in these arguments [of the access advocates], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the *express provisions* of the First Amendment and the judicial gloss on the Amendment developed over the years . . . .
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> . . . .
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> . . . A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.[380]

Compare this to the following conception of the First Amendment:

> But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the *ends and purposes* of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[381]

The first passage, focusing on the press, implicates the "express provisions" of the First Amendment, while the second passage, discussing broadcast, implicates the First Amendment's "ends and purposes." The "express provisions" rule prevents regulation, while the "ends and purposes" rule commands it.

Lee Bollinger has provided a sophisticated theory that attempts to integrate these disparate strands of mass media law into a complex and multi-layered view surveying the doctrinal interactions between the strands as well as the communications between the Supreme Court and

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[380] *Tornillo*, 418 U.S. at 254–56 (emphasis added).

[381] *Red Lion*, 395 U.S. at 390 (emphasis added).

mass media speakers.[382] Bollinger ultimately welcomes the seemingly dichotomous nature of First Amendment law in this area, arguing that:

> [b]y permitting differential treatment of these institutions [press and broadcast], the Court can promote realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal government intervention. Thus neither side of the access controversy emerges victorious. The Court has imposed a compromise, not based on notions of expedience but on a reasoned, principled, accommodation of competing First Amendment values.[383]

Bollinger's insight—that the two regimes do not just passively coexist but in fact are part of a complicated and multivalent First Amendment jurisprudence—indirectly strengthens the case for broadcast regulation. Whatever the internal flaws of the arguments in favor of broadcast regulation, it may be inappropriate to look at them in isolation. It is possible that the benefits that flow from having a regime of partial regulation outweigh the losses from the flaws and shortcomings of the pro-regulation arguments. Moreover, it is possible that these arguments are really just conceptual crutches, awkward accommodations made in the face of a powerful "central image"[384] in order to express and realize important values that the central image does not easily accommodate.[385] If the traditional rule is an illusion, or at least a gross simplification of the existing constitutional reality, then taking it as the definitive rule of First Amendment law may constitute a serious misunderstanding of the real sweep of constitutional adjudication in this area.

These are some of the objections that a defender of the partial-regulation status quo, like Bollinger, would make to anyone who proposes a fundamental decision in favor of one or the other strand of mass media law. His proposal is to desist from making such blunt decisions, and instead to move towards a full appreciation of the interactions between the dichotomous rules as well as of the complexities within

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[382] *See* LEE C. BOLLINGER, IMAGES OF A FREE PRESS (1991).

[383] *Id.* at 116.

[384] *Id.* at 1.

[385] In this way, a Bollingerian analysis of the German situation and of what I have called the unreasoned differential treatment of broadcast and press might suggest that I am missing the larger picture. Such an analysis might try to find underlying themes, interactions, and cross-currents, between the Constitutional Court's press and broadcast jurisprudence, and it might even

each strand.[386] Bollinger's argument is subtle and powerful; I cannot fully do it justice here. His argument, however, suffers from a serious weakness. In order for Bollinger's integrated and complex theory to work, he must presuppose some sort of plausible distinction between press and broadcast. When he writes that "the very similarity of the two major branches of the mass media provides a rationale for treating them differently,"[387] he is, inadvertently perhaps, hinting at a limiting principle of his theory. Because the two branches have similar functions in the public realm, the values each achieves within itself can cross-fertilize and spark desirable developments in the other while simultaneously keeping its own drawbacks in check. Were the two branches to be largely incommensurate, then the central virtue of the dual system, namely, the possibility of promoting distinct constitutional values, would drop out of the picture, and Bollinger's theory would not work. Thus, some degree of similarity is one limit on the feasibility of Bollinger's theory. There is, however, a limit on the other side as well. If broadcast and press have always been much more similar than the Supreme Court has assumed, if thus the differential treatment of them has always been based on a deeply flawed view of broadcast,[388] then Bollinger's argument serves to solidify and glorify a mistake, an immature and confused view of the electronic media.[389] This consolidation and entrenchment of an ill-considered approach to a new technology might be justifiable by virtue of the benefits that flow from a dual regime as such, irrespective of the wisdom or lack thereof underlying one branch, as long as the empirical reality of broadcast

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be successful in such a search, despite the fact that the Court itself has not developed an explicit and full-fledged theory for the dichotomy.

[386] *See* BOLLINGER, *supra* note 382, at 116–20.

[387] *Id.* at 116.

[388] Lucas R. Powe argues that at the root of the differential treatment of broadcast and press was simply a pervasive feeling that broadcast is somehow not as worthy of First Amendment protection as the press.

> Gone [by 1943] was the FRC . . . claim that broadcasting was unworthy of First Amendment protections. In its place had sprung up a newer and more elaborate version of the same claim: broadcasting was entitled to some First Amendment protections, but its special characteristics demanded a different First Amendment, one regulated by the federal government. The difference in the form of the argument, however, could not disguise the substantive constancy. Neither the FRC nor the FCC had the slightest doubt that the traditions of the print media did not apply to broadcasters. The argument was simply recast to suit a new era.

LUCAS R. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 31–32 (1987).

[389] *See id.*

and press were reasonably stable and unchanging. If the two branches operated the way they did in, for example, the 1960s and 1970s, and if it were quite clear that they would remain that way for the foreseeable future, then Bollinger's calculus might work.[390]

In reality, broadcast and press are not static. On the contrary, they are developing wildly and explosively, propelled by technologies that were unimaginable only a few years ago, acquiring and disseminating information at ever increasing quantity, speed, and efficiency. In the process, they are becoming ever more like each other. They converge.[391] The phenotypical distinctions between the press (that which we find in front of our doors every morning) and broadcast (such as that which appears on our television screen at night) are becoming less important. The information gathering process of the press, and even the printing process, are dependent upon electronics. Virtually every newspaper may be read via one's computer. Technologically, press and broadcast are converging upon the same form.

In order for a dual regime to make sense, the two branches must be significantly differentiated. Otherwise the duality is simply arbitrary. Assume a world with only one mass medium. Furthermore, assume that ownership is diversified, that there are national and local entities, and that competition functions acceptably. In a situation like this, partial regulation cannot be the solution. How would we determine who is to be regulated and who is to be left alone? By lottery? In a unified system, the method of realizing divergent values by using differential constitutional rules is inapposite, and another way of achieving the desired values must be devised. Press and broadcast are developing toward a unified system, increasingly depriving the partial regulation scheme of its empirical foundations, which have always been tenuous to begin with.[392]

Therefore, Bollinger's static acceptance of the existing technological realities, his failure to take the convergence of press and broadcast into

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[390] *See* BOLLINGER, *supra* note 382, at 153 ("Up to now the system has thrived on an intellectual posture in which the fundamental premises of each branch are treated as utterly discrete and largely self-evident.").

[391] *See generally* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

[392] *See* BOLLINGER, *supra* note 382, at 153. Bollinger realizes that the premises of his theory are becoming more and more tenuous. He believes that one cost of the dual regime is:

> that the implicit assumption about the need to locate a material difference to justify a system of differential treatment is now causing the fictions employed to outdo good sense, as public policy in this area is being reconsidered.

Id.

account, and his acquiescence in the Supreme Court's lack of understanding of the broadcast medium,[393] make it clear that the partial regulation theory has limited viability.[394] Bollinger's theory was a late effort at distilling some value from the dual regime, whose premises were unstable from the outset. Perhaps he succeeded with respect to the situation approximately up to the 1980s. His argument is most applicable to the time in which his two model cases, *Red Lion* and *Tornillo*, were decided.[395] Sooner or later, however, the dual regime will lose its empirical basis by virtue of technological transformations, and we will be forced to make a choice between the two approaches to mass media law.[396]

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[393] *See generally id.* at 108–55. Bollinger believes that his "analysis of [Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)] and [Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)] demonstrates the need to maintain a partial regulatory structure *for its own sake*." *Id.* at 116. This reading of the cases is both too favorable and too optimistic. Bollinger is extremely sensitive to how different *Red Lion* is from the press cases. He then explains this divergence by identifying a deep underlying cohesion. Is there not a simpler, more plausible explanation? Could it not be that *Red Lion* was simply an example of judicial blindness? Could it not be that Powe is correct and that the technological differences between the two media seduced the Court into making a monumental mistake? Bollinger's own description of the case suggests exactly that—which, ironically, makes his own alternative explanation seem labored:

> To read the Court's unanimous opinion in *Red Lion* is to step into another world, one that encompasses a dramatically different way of thinking about the press and about public regulation . . . .
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> . . . *Red Lion*, therefore, reads like a tract that treats the press as the most serious threat to the ultimate First Amendment goal, the creation of an intelligent and informed democratic electorate. It is noteworthy that in its opinion the Court not once refers to the broadcast media as the "press," or to broadcasters as "journalists" or "editors." In the idiom chosen, broadcasters are referred to only as "licensees," "proxies," and "fiduciaries," or as the holders of "monopolies" capable of exercising "private censorship."
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> . . . In *Red Lion*, the Court acted as if it were reviewing a decision of an ordinary administrative agency, to which great deference had to be paid to its expertise in dealing with "a new technology of communication."

Id. at 72–73.

[394] *See* BOLLINGER, *supra* note 382, at 151. Bollinger hints at the possibility that the two strands of the dual regime will come closer together. *Id.* However, he seems to view this as predominantly a conceptual, rather than technological, development. *Id.*

[395] *See supra* note 393.

[396] *See* Adelman, *supra* note 271, at 1339. Adelman makes a similar point, but with a slightly different emphasis:

F. *The Substantive Critique of the American Broadcast System and the Elitist Fallacy*

Regulation advocates often undervalue the quality and accomplishments of the current media output and overvalue the problems of, and risks associated with, these media. As a consequence, their arguments in favor of media regulation are weakened. Sunstein's book is a vivid example of this phenomenon. Sunstein provides the following summary of his key complaints about current media output:

> But it would not be an overstatement to say that much of the free speech "market" now consists of scandals, sensationalized anecdotes, and gossip, often about famous movie stars and athletes; deals rarely with serious issues and then almost never in depth; usually offers conclusions without reasons; turns much political discussion into the equivalent of advertisements; treats most candidates and even political commitments as commodities to be "sold"; perpetuates a bland, watered-down version of contemporary morality on most issues; often tends to avoid real criticisms of existing practice from any point of view; and reflects an accelerating "race to the bottom" in terms of the quality and quantity of attention that it requires. The current system also makes it difficult for many views, especially dissenting views from the right or the left, to get a serious hearing at all.[397]

Given this sorry state of affairs, Sunstein concludes, there is nothing to celebrate about the American free speech system.[398] Since current media production is so feeble, the state should intervene.[399]

This type of argument is certainly not new. In fact, it is just another late blossoming of a time-honored tradition that arose when film and radio broadcast began. Lucas A. Powe aptly summarizes the courts'

> [T]he structure of media is less and less bipolar. New forms of electronic media are coming "on-line" (literally) seemingly every day. At the same time, people are relying less on newspapers as a significant source of information. As newspapers decline in relative significance, their ability to serve as the unregulated safety valve envisioned by Bollinger will decline as well . . . .

Id.

[397] SUNSTEIN, DEMOCRACY, *supra* note 8, at 22–23. For a more extensive treatment of these issues, *see id.* at 58–67.

[398] *Id.* at 23.

[399] *See id.*

reaction to claims of First Amendment protection made for very early motion pictures when he states:

> Thus in the first cases involving a new technology that claimed the protections of freedom of speech, the Court almost summarily rejected the argument. These were not newspapers: they were much closer to circus acts. And no one thought making a tiger jump through a flaming hoop had anything to do with the traditions of John Milton and John Peter Zenger. When the problem of radio arose a little more than a decade later, an identical conclusion was carried over. Radio programming was entertainment and thus no part of the exposition of ideas entitled to the protection of the First Amendment.[400]

In 1948, Alexander Meiklejohn published *Free Speech and Its Relation to Self-Government.*[401] This book contains a ringing condemnation of radio, the main broadcast medium of the day. This condemnation voices essentially the same concerns as does Sunstein about 45 years later.[402] It is an important statement. Meiklejohn does not just criticize radio programs. He formulates a standard for them that goes far beyond demanding thorough and diverse political coverage. He sees the new medium as a grand opportunity for transmitting among all citizens the shared values of a common life.[403] This Meiklejohn quotation is useful—not so much for what he thinks about the radio as it exists at his time, but for what he believes such a new mass medium should accomplish:

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[400] POWE, *supra* note 388, at 29.

[401] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereinafter MEIKLEJOHN, FREE SPEECH].

[402] The most aggressive and least helpful denouncement of television that I have encountered is that by President Kennedy's chairman of the FCC, Newton N. Minow. Minow, in a 1961 address to the National Association of Broadcasters, expressed his deep-seated disdain for television by stating:

> . . . [Television is] a vast wasteland. You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly, commercials—many screaming, cajoling, and offending. And most of all, boredom.

Newton N. Minow, Address to National Association of Broadcasters (1961), *quoted in* JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 198 (1991).

[403] MEIKLEJOHN, FREE SPEECH, *supra* note 401, at 86–88.

When this new form of communication [commercial radio] became available, there opened up before us the possibility that, as a people living a common life under a common agreement, we might communicate with one another freely with regard to the values, the opportunities, the difficulties, the joys and sorrows, the hopes and fears, the plans and purposes, of that common life. It seemed possible that, amid all our differences, we might become a community of mutual understanding and of shared interests. It was that hope which justified our making the radio "free," our giving it the protection of the First Amendment.

But never was a human hope more bitterly disappointed. The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.

As one utters these words of disappointment, one must gratefully acknowledge that there are, working in the radio business, intelligent and devoted men who are fighting against the main current. And their efforts are not wholly unavailing. But, in spite of them, the total effect, as judged in terms of educational value, is one of terrible destruction. The radio, as we now have it, is not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends. On the contrary, it is a mighty force for breaking them down. It corrupts both our morals and our intelligence. And that catastrophe is significant for our inquiry, because it reveals how hollow may be the victories of the freedom of speech when our acceptance of the principle is merely formalistic. Misguided by that formalism we Americans have given to the doctrine merely its negative meaning. We have used it for the protection of private, possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture, the newspaper and other forms of publication, are giving the name

> "freedoms" to the most flagrant enslavements of our minds and wills.[404]

Whether or not Meiklejohn's critique of the radio was justified in the 1940s, applying it wholesale to our time, as Sunstein does, is not supported by the facts. The modern Meiklejohn-type critique is elitist. It is based on an overly specific interpretation of the word "political." It discounts the crucial integrative function, in Meiklejohn's sense, that television has on modern American life. It misunderstands or misinterprets the nature of popular choice concerning what to watch.

Let us agree that attention to public issues, diversity, "high-quality"[405] programming, and the fostering of a "community of mutual understanding and of shared interests"[406] are indeed relevant criteria according to which to judge the products of the broadcasting media. Does American television fall short of these demands? Not necessarily. If analyzed in the appropriate way, American television meets Meiklejohn's demands.[407] It does so not because of the existing regulations, but because of broadcasters' market considerations, concerns regarding ratings, and profit motives. This "quality through viewer dictate" (i.e., ratings) adds another important positive dimension to a commercial broadcast system, namely, the voluntariness of popular choice and hence the broad popular support of social and political advances made in the commercial broadcast realm.

When scholars such as Sunstein, Fiss, or Bollinger talk about the lack of political dimension of broadcasting, they have something rather concrete in mind. They are referring to "MTV" and reruns of "I Love Lucy," as opposed to public debate.[408] They are referring to programming motivated by monetary concerns, as opposed to programming motivated by the desire to provide "full and fair information about

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[404] *Id.*

[405] SUNSTEIN, DEMOCRACY, *supra* note 8, at 91.

[406] MEIKLEJOHN, FREE SPEECH, *supra* note 401, at 79.

[407] Of course there are weaknesses in television programming, even serious ones. For example, the low quality of children's programming, and the inordinate amount of advertising during it, need to be remedied. But, as I have said before, while such complaints are valid, they do not furnish grounds to condemn the whole broadcast enterprise.

[408] *See* Fiss, *Why the State?*, *supra* note 5, at 788. Fiss writes:

> . . . Reruns of *I Love Lucy* are profitable and an efficient use of resources. So is MTV. But there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society.

public issues."[409] In simple terms, they mean "low-quality fare" as opposed to "high-quality fare."[410] They know high-quality fare when they see it "because they have been educated to do so,"[411] and what the media are currently presenting is not that.[412]

These scholars are wrong. American television certainly has its share of "low-quality" fare, such as late-morning game shows and many talk shows. But on the other end of the quality spectrum, there are shows that deserve to be called works of art under any reasonable definition, such as certain episodes of "Cheers" or "I Love Lucy," and programs—commercial mass programs—that have on occasion treated important political or social topics with sensitivity, depth and thoroughness. Prominent among such programs are, for example, "M.A.S.H," "Roseanne," and "The Cosby Show."

The scholarly evaluations of television programming are often based on elitist closed-mindedness and class prejudice. What these men see on television does not correspond with their preconceived notions of what rational political debate is supposed to resemble. They are trained to value and to recognize discourse that proceeds by rational argument, by reasoned verbal exchange. They are *not* trained to perceive political substance in entertaining visual images or in argument that proceeds by other than the strict formal structure of intellectual debate or academic discourse. Assumptions are being made about what is

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Id. at 788. I do not agree with this division, and I do not agree with the implication that television contributes nothing of significance to supplying the electorate with political information, etc. Of course, the market is not perfect. Of course, it is "itself a structure of constraint." *Id.* at 787–88. But so is the state. And Fiss does nothing to convince his readers that state-imposed biases are less problematic than market-imposed ones. Without a comparative empirical argument in favor of state constraints over market constraints, combined with an equally concrete argument showing that state regulation of speech is less dangerous than market regulation, Fiss's embracing of the state is not justified.

[409] BOLLINGER, *supra* note 382, at 139.

[410] SUNSTEIN, DEMOCRACY, *supra* note 8, at 90.

[411] *Id.* at 91.

[412] This sentence is, of course, modeled on Justice Stewart's beautiful phrase in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). In trying to determine whether a certain movie met his "hard-core pornography" criterion, Justice Stewart honestly admitted to using his instincts as his main guide: "But I know it when I see it, and the motion picture involved in this case is not that." Methodological candor can be helpful. Justice Stewart, admirably courageous, drew attention to the irreducibly subjective quality of substantive judgments about speech. It is the cautionary lesson implicit in Stewart's approach that Sunstein, Fiss, and Bollinger have not heeded. On the margins (extremely violent or obscene speech, for example) some substantive judgments about speech plainly have to be made. But, except in such boundary situations, substantive evaluations of speech should be kept to a minimum, and should not be used as the methodology for evaluating speech in a certain area, such as the mass media.

"high-quality" television programming or newspaper reporting, while very few reasons are given why the critics' particular criteria should be controlling. Especially with regard to American television, the result of such selectivity in ascribing value is that the political and social importance of a considerable amount of programming is being systematically undervalued. The accuracy and reliability of the critics' empirical findings are thus compromised.

Television fulfills the immensely important social function of providing a social glue and cohesion for an extraordinarily diverse and increasingly ethnically splintered nation. Meiklejohn touched on something deep, something that the later critics of broadcast tend to ignore.[413] This is the need—for the functioning of this democracy, this society—to "communicate with one another freely with regard to the values, the opportunities, the difficulties, the joys and sorrows, the hopes and fears, the plans and purposes, of that common life,"[414] and to teach the "mutual understanding upon which the enterprise of self-government depends."[415]

If connecting people, articulating common values and aspirations, and treating social and political problems are necessary functions of broadcasting, then the American television system is functional. There is probably no serial program anywhere in the world that dealt with the effects of war as successfully, movingly, and adequately as "M.A.S.H." The earlier "Roseanne" episodes were an outstanding treatment of working-class life and the all-important task of raising children. These and other shows accomplish this without any heavy-handed moralizing; on the contrary, they are among the funniest programs ever produced. They are characterized by artistic, political, and social quality. In addition, they have mass appeal. This combination gives American television programming a social effectiveness or "reality" that is unachievable, or actually prevented, by regulatory fiat. The real social gain that the presence of Nichelle Nichols on the original "Star Trek" or the recent "coming out" of Ellen DeGeneres' character on her prime time show and the publicity surrounding that event represents is worth more than programs that are socially progressive due to state man-

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[413] *See* MEIKLEJOHN, FREE SPEECH, *supra* note 401, at 86–88.

[414] *Id.* at 86.

[415] *Id.* at 87. This is not to deny the fact that cold manipulation and rampant commercialism permeates television. But the search for decent motives is fruitless; it is based on sentimental notions that are quite inapposite in a capitalist system where self-interest and profit-seeking function as prime social engines.

date.[416] It is the people's voluntary acceptance of having their horizons expanded which makes the difference and gives the freely chosen programs their special value. These commercial programs must be in close touch with what people want to see; otherwise, they lose rating points. By virtue of their attention to and dependence upon their audience, they are likely to be more effective in achieving social awareness and political communication than ratings-independent mandatory programs. Progress carried by the broad wishes of the people, as ascertained by the fact that they are watching in huge numbers, is real. "Progress" through authoritative intervention may really be achieving nothing but apathy, complacency, and lack of interest—precisely because the audience is not "responsible" for the programming presented to them, and because that programming does not need to make any effort to address an audience.[417]

Sunstein has foreseen the elitist objection to his Madisonian reconceptualization of the First Amendment.[418] His counter-argument to this objection, ironically, accomplishes the contrary of what he intends: it reveals the deep and inappropriate elitism at the core of Sunstein's First Amendment analysis.[419] Sunstein believes that the elitist objection "is rooted in the perception that high-quality fare is appreciated most by the highly educated, who are (not incidentally) the most wealthy."[420] Sunstein agrees wholeheartedly with this perception; he just does not view it as a criticism.[421] Of course, he argues, the well-educated probably will disproportionately watch that high-quality programming which his Madisonian regulatory system will bring to the television screen.[422]

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[416] Nichelle Nichols' presence on "Star Trek" has been viewed as an important advance for black people on mainstream (white) television. "After enduring racial insults off the 'Star Trek' set, Nichols was ready to leave the cast after one season. Then she was introduced to [the Rev. Martin Luther] King at an NAACP fundraiser. 'You must not leave,' he told her. 'Don't you see you're not just a role model for little black children. You're more important for people who don't look like us. For the first time, the world sees us as we should be seen, as equals, as intelligent people.'" *Hardcovers in Brief*, WASH. POST, Oct. 30, 1994, at X13 (review of NICHELLE NICHOLS, BEYOND UHURA: STAR TREK AND OTHER MEMORIES (1994)).

[417] "Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons. No conviction forced upon us can really be ours at all." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

[418] SUNSTEIN, DEMOCRACY, *supra* note 8, at 90–91.

[419] There is, of course, such a thing as good and appropriate elitism, and Sunstein is trying to claim it for his argument.

[420] SUNSTEIN, DEMOCRACY, *supra* note 8, at 90–91.

[421] *See id.* at 91.

[422] *See id.* at 90.

But so what?, he asks. Individuals who spend years studying at well-known, elite institutions of higher learning are trained to enjoy high-quality fare.[423] In contrast, uneducated people typically enjoy low-quality fare.[424] Through a form of trickle-down theory of public education, the whole public will benefit—we, the educated ones, will keep public debate up and running, and the occasional individuals "who are not college graduates" and sit through a high quality program despite their lack of intellectual preparedness "may receive disproportionately high benefits."[425]

This analysis is supported by little more than class prejudice, which becomes visible in the following phrase: "What some people think to be sensationalistic anecdotes, or low-quality fare, represents the basic entertainment choices of many Americans."[426] Sunstein, it seems, has never looked at television from a perspective other than the top of an ivory tower. He has apparently never understood the sheer comedic genius and outstanding quality of yet another perfect episode of "The Simpsons" or "Married-with Children." These and other programs are representative of American television—purely commercial products, created for the sole reason of making money. If the market and the preferences of ordinary Americans can produce such outstanding products, then the "current system of free expression"[427] is something to celebrate after all.

In a later passage entitled "What is political?", Sunstein includes certain categories of speech into his first-tier Madisonian free speech structure that do not conform to the strict notion of political communication yet merit high-level protection.[428] He does so "because it is important to create a large breathing space for political speech by protecting expression even if it does not explicitly and securely fall

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[423] *See id.* at 91.

[424] *See id.* at 90.

[425] *See* SUNSTEIN, DEMOCRACY, *supra* note 8, at 91.

[426] *Id.* at 90.

[427] *Id.* at 23. In the same way, Fiss has used "I Love Lucy" as the representative example of commercial, anti-public debate programming that he wants to see remedied. FISS, WHY THE STATE?, *supra* note 5, at 788. What he overlooks is the fact that "I Love Lucy" is of superb quality, and quite indistinguishable in its artistic and amusement value from a Metropolitan Opera simulcast of, say, "L'Elisir D'Amore" (except that more people are likely to enjoy "I Love Lucy" than "L'Elisir D'Amore"). If we agree with the later Meiklejohn (and with Sunstein) that art is included in the "political" protection of the First Amendment, then the juxtaposition that Fiss proposes cannot be usefully maintained.

[428] SUNSTEIN, DEMOCRACY, *supra* note 8, at 152–54.

within that category [political speech]."[429] One might expect to find at least some of the politically relevant, high-quality products of American commercial television among the speech categories Sunstein has selected. Disappointingly, however, Sunstein's examples of "art that ha[s] the characteristic of social commentary,"[430] seem simply copied from a generic reading list of a Great Books college course, with a token controversial entry thrown in for good measure. Unsurprisingly, we find here *Ulysses, Bleak House,* Shakespeare, Wordsworth and—Mapplethorpe.[431] "Roseanne" and "Oprah," of course, did not make the list. They escape Sunstein's attention because he regards commercial television as trash,[432] art as that which is not normally of interest to the "many people who are not college graduates,"[433] and "many Americans" as choosers of "sensationalistic anecdotes, or low-quality fare."[434]

Closely associated with the critique of broadcast's substance is the argument from the "failings of intellect."[435] According to this argument, people's choices are the result of weakness of intellect or willpower, of acculturation to the miserable program offerings, and of learned preference for and underdeveloped revulsion against poor and limited options.[436]

The substance of this argument is more than one hundred years old. In 1890, Louis Brandeis and Samuel Warren stated the basic concern rather forcefully with respect to the press:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real

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[429] *Id.* at 152.

[430] *Id.*

[431] *Id.* at 152–53.

[432] *Id.* at 90.

[433] SUNSTEIN, DEMOCRACY, *supra* note 8, at 91.

[434] *Id.* at 90.

[435] BOLLINGER, *supra* note 382, at 139.

[436] *Id.* at 139–41; SUNSTEIN, DEMOCRACY, *supra* note 8, at 90–91.

> interest to the community, what wonder that the ignorant and the thoughtless mistake its importance. Easy of comprehension, appealing to the weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[437]

There are thus two sets of interests with which the people can concern themselves. One consists of the lazy and undisciplined tastes to which the mass media pander.[438] The reinforcing cycle of people's prurient interests and the media's satisfaction of them has a detrimental effect on the viability of a democracy.[439] The other consists of the community's "real interests," those having to do with governmental decision-making, political information, and education—in short, those interests that motivate and sustain a democracy.[440]

Sunstein phrases this dichotomy in terms of "aspirations" and "consumption choices."[441] The divergence between the two exists, Sunstein claims, because people have been habituated to expect and prefer the "existing fare,"[442] which is identical, of course, with "low-quality fare."[443] They have not had a chance to acquaint themselves with a better system, and thus to develop a preference for it.[444] Because the current private choices are the result of unfortunate acculturation to commercial broadcasting, they are not truly autonomous choices.[445] Thus, a regulation of these choices does not infringe on autonomy interests; it "does not displace a freely produced desire."[446] In sum, the people,

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[437] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). As someone who came to the United States only recently, I disagree sharply with the conclusion stated in the final sentences of the quotation. In my experience, enthusiasm and generosity are two of the defining and most reliable characteristics of Americans of all socioeconomic and ethnic descriptions. Since these characteristics have obviously survived and flourished despite all the "blighting influence" of rampant gossip being spread throughout society by the mass media, I must conclude that there is something fundamentally wrong with this type of criticism.

[438] *See id.*

[439] *See id.*

[440] *See id.*; *see also*, SUNSTEIN, DEMOCRACY, *supra* note 8, at 19.

[441] SUNSTEIN, DEMOCRACY, *supra* note 8, at 74.

[442] *Id.*

[443] *Id.* at 90.

[444] *Id.* at 74.

[445] *Id.*

[446] SUNSTEIN, DEMOCRACY, *supra* note 8, at 74. "When private choice is a product of existing

while they are not really to be blamed for this, choose badly. If they, in a moment of intellectual lucidity and discipline, decide to correct their everyday mistakes, then the First Amendment should not stand in their way. After all, regulation against "existing fare" would be driven by Madisonian concerns.[447] As a consequence, "at least some people would be educated as a result, and be more favorably disposed toward programming dealing with public issues in a serious way."[448]

Bollinger discusses this particular issue as well. He views the problem of people's "consumption choices" as inherent in everyday choice-making as such, arguing as follows:

> [E]ven in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public institutions.[449]

Why would that be the case? What is it about human nature that inevitably depresses the quality of public discourse? Bollinger has a complex answer.[450] He lists an impressive catalogue of human weaknesses, all of which can contribute to narrowness or shallowness of outlook, and to an unwillingness to perceive and confront adverse voices.[451] In essence, Bollinger views the tendency to parochialism as a universal human characteristic, in need of constant correction.[452]

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options, and in that sense a product of law, the inclusion of better options, through new law, does not displace a freely produced desire." *Id.* This is too broad a statement, and it is too smoothly syllogistic in the way the resulting constitutional determination is reached. Something is wrong here: this theory makes potentially all private choices something other than "freely produced." When, after all, can one say that a private choice is *not* the "product of existing options"?

[447] *See id.*

[448] *Id.*

[449] BOLLINGER, *supra* note 382, at 139.

[450] *See id.* at 138–41.

[451] *Id.*

[452] *See id.* at 139–40. Bollinger writes:

> Even in a world of unlimited opportunities we may not be sufficiently interested in informing ourselves about public issues, preferring entertainment and pleasure to the responsibilities of citizenship, a condition that recalls Brandeis's concern about the debilitating effects of invasion of privacy and gossip. We may not feel sufficiently educated to know what questions to ask about certain public issues or what level of deference to pay to expertise. We may fear that we do not understand what possible heights can be reached in art or in discussion of public issues. We may wish to avoid the opinions of those with whom we disagree, especially those on the margins of public debate, the

While Bollinger's argument certainly provides an accurate description of many human behaviors and motivations, the extent to which it should have a bearing on public debate-motivated regulation of the media is uncertain. Even in debate-enriched programming, the remote control enables anybody who only wants to listen to people with similar viewpoints and beliefs to do just that. Nobody argues in favor of universally *mandated* watching of "radical voices."[453] Ultimately, then, Bollinger and Sunstein are both too pessimistic and too aspirational in their view of the "people." In their strict dichotomy between the commercial and the political, between consumption and aspiration, there expresses itself a rigorous, disciplined, ethical and honorable view of human behavior, human education, and human progress.[454] Sunstein and Bollinger view the choices people ordinarily make as easy, lazy, habitual choices, choices based on some sort of weakness.[455] Bollinger makes this clear when he states:

> We have good reason to be weary of ourselves, and we should fear not just the failures of the market system but our own failure of intellect. A democratic society, like an individual, should strive to remain conscious of the biases that skew, distort, and corrupt its own way of thinking about public issues. Society should be intellectually humble, in the way that a true education tries to inculcate respect for one's own ignorance and intellectual incapacities.
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> . . . .
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> We recognize that if we are left to choose on our own whether and how to inform ourselves, too many will neglect to undertake the burden of self-education, choosing instead to pursue more pleasant things. Or we may inform ourselves

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radical voices. As a result, there may be a diaspora of viewpoints and an unheeding of troubled or troubling voices. We may not think clearly about some aspects of public issues. We may be too concerned with avoiding the costs of reasonable choices, too unwilling to accept an imperfect world . . . or too unconcerned about the future costs of our choices and reforms, to willing to see greener grass in new alternatives . . . . We may have irrational prejudices against particular groups or individuals within society. Or we may be unduly influenced, and have our judgements distorted, by particular kinds of information in specific contexts.

Id. at 139–40.

[453] *Id.* at 139.

[454] SUNSTEIN, DEMOCRACY, *supra* note 8, at 73–74, 90–91; BOLLINGER, *supra* note 382, at 138–41.

[455] *See* SUNSTEIN, DEMOCRACY, *supra* note 8, at 90–91.

> only selectively, following the natural inclination to seek out those with whom we agree.[456]

Bollinger's aspirational vision of society is beautiful and attractive in its sensitive recognition of human weakness. Nonetheless, it is unconvincing. In The Federalist No. 10, Madison argued that "[t]he latent causes of faction[457] are . . . sown into the nature of man."[458] Federalist No. 51 states that factional tendencies cannot be eliminated; rather, in order for a free society to thrive, they must be embraced and put in the active service of freedom.[459] The following famous argument from Federalist No. 51 should go a long way toward assuaging Bollinger's concerns about the dangers of parochialism and of people's insufficient exposure to alternative views.[460]

> Whilst all authority in [the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.[461]

According to this statement about American social structure, human closed-mindedness is not the problem, but the solution.

There is another dimension to the criticism of Brandeis, Bollinger, and Sunstein. It deals with the pleasure aspect of broadcast entertainment. Brandeis, Bollinger, and Sunstein fear what they perceive to be the shallowness and blandness promoted by the mass media, a kind of race to the bottom, to the lowest common denominator, of public

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[456] BOLLINGER, *supra* note 382, at 139, 141.

[457] Madison defines "faction," much in agreement with Bollinger's description, as:

> a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

THE FEDERALIST NO. 10, at 54 (James Madison) (1941).

[458] *Id.* at 55.

[459] *See generally* THE FEDERALIST NO. 51, at 339–40 (James Madison) (1941).

[460] BOLLINGER, *supra* note 382, at 138–41.

[461] THE FEDERALIST NO. 51, at 340–41.

discourse.[462] This fear is based on cultural misperceptions. The basic outlook of these critics of broadcast culture causes them to misunderstand what is really happening. They impermissibly universalize their own limited viewpoint, seeking to impose a set of very specific values on a society that may not share them.

Bollinger, in particular, seems to conclude from the very pleasantness of watching an entertainment program rather than a challenging political discussion that the former is somehow less valuable than the latter.[463] Bollinger is deeply convinced that quality political discourse requires discipline, humbleness, concentration, consciousness of biases and so on—in short, it requires unpleasant, burdensome things.[464] A "true education" is a burden; entertainment is pleasant.[465] Therefore, the fact that much of broadcast programming is pleasant and easy to watch indicates to Bollinger its inferior quality.

Bollinger's and Sunstein's analysis of popular choice is ultimately puritanical. Such an analysis comes from people who have spent their whole lives disciplining, forming, educating themselves, and who are conscious of the tremendous amount of work and energy thus expended. Such people must have a difficult time acknowledging the entertainment choices of the masses as anything but shallow. The apparent lack of discipline and responsibility in the way people watch television must be distressing to one who has built his life around ideals of discipline and responsibility.[466]

Bollinger's and Sunstein's critiques are respectable but mistaken. Pleasure does not necessarily mean shallowness. Television's political dimension and quality are invisible to Bollinger and Sunstein because they present themselves in the guise of entertainment, of pleasure, of lazy preference instead of hard-won discipline. Pleasure and learning, entertainment and expansion of horizon, fun and political awareness are often smoothly blended in popular programs. But a life in a

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[462] BOLLINGER, *supra* note 382, at 138–41; SUNSTEIN, DEMOCRACY, *supra* note 8, at 73–74, 90–91; Warren & Brandeis, *supra* note 437, at 193.

[463] BOLLINGER, *supra* note 382, at 139–40.

[464] *See id.* at 139.

[465] *See id.*

[466] Balkin's frenetic channel-switching habits, described in the opening section of his *Populism and Progressivism* article, suggest to me a similar attitude. "Zap. On C-SPAN, there's a discussion of Clinton's foreign policy. I keep flipping. I check out The Simpsons again. Inside Edition. VH-1. I mistakenly land on C-SPAN. Oops. Zap. Zap. Zap. I keep flipping. I am being a very bad boy." Balkin, *supra* note 260, at 1940. Balkin calls this absurd activity "watching television." *Id.* at 1939. I don't. I call it evidence of a bad conscience at the idea of enjoying entertainment that is less than high-brow. Why doesn't he stick with "The Simpsons" and allow himself to have a good time?

demanding intellectual environment blinds Bollinger and Sunstein to the real quality of the choices that the supposedly hedonistic masses are actually making. Bollinger's and Sunstein's critiques are wrongly elitist because they are based on the systemic prejudices of an intellectual class that reflexively assumes that the masses, those without a "true education," must be inferior choicemakers whose decisions and predilections could not possibly give rise to products of high quality, high societal relevance, as well as excellent entertainment value.

IV. CONCLUSION

At the core of this article is a concern about the consequences of a certain kind of abstract systematizing in legal analysis. Legal analysis goes astray when a doctrinal question is transformed into a question purely about the values underlying the doctrine. Structuring legal questions in this manner is attractive. It minimizes complicated doctrinal and factual questions, and it makes issues grand, simple, and philosophically pure. In this way, Fiss achieves harmony among *New York Times v. Sullivan* and *Red Lion*, Sunstein transforms the state action doctrine into an instrument of governmental regulation of speech, and the German Constitutional Court reads the constitutional guarantee of freedom of broadcast as a mandate for pervasive regulation of all broadcast.

It is obvious that Fiss and Sunstein are intensely morally committed to their preferred First Amendment values. Nevertheless, there has to be, in the interest of the integrity and stability of the legal system, a moral commitment to lowly legal doctrine as well. This is not to say that legal doctrine cannot change, even drastically. There is a difference, however, between a careful, even if pronounced, change in legal doctrine motivated by important value commitments, and the wholesale abandonment of an extremely sophisticated and well-developed body of doctrine on the basis of tectonic shifts performed entirely at the level of ultimate abstraction. Fiss's embrace of the state as friend of the First Amendment and Sunstein's transformation of the state action doctrine into an instrument of regulation in the name of Madisonianism are examples of such tectonic shifts. The arguments of Fiss and Sunstein, and particularly those of the German Constitutional Court, circumvent gritty doctrinal struggle by virtue of their philosophical grandeur. They are too elegant, too enamored of their own rationality, too disrespectful of the right to free speech. The German Constitutional Court is more committed to its system of ultimate values

than to the right of speakers freely to express themselves. Analogously, Fiss and Sunstein do not take the First Amendment and its grown body of doctrine as seriously as their own ideas about its underlying values. As a consequence, that body of doctrine is reduced to the status of "operational detail."[467] It is, however, exactly this "mundane, messy"[468] operational detail which constitutes the heart of the right to free speech.

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[467] FISS, IRONY, *supra* note 8, at 57.

[468] NUSSBAUM, *supra* note 31, at 372.